TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 314

REALTY ACCEPTANCE CORPORATION,
PETITIONER,

vs.

HENRY G. MONTGOMERY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

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(36,128)

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IN UNITED STATES DISTRICT COURT, DISTRICT OF DELAWARE, MARCH TERM, 1927

No. 25

HENRY G. MONTGOMERY, Plaintiff,

v.

REALTY ACCEPTANCE CORPORATION, Defendant

DOCKET ENTRIES*

July 10, 1929.—Transcript of record certified and delivered to attorney for defendant-appellant.

Mar. 27, 1930.—Certified copy of order of U. S. Circuit Court of Appeals staying proceedings, &c., filed.

Apr. 10, 1930.—Petition of defendant, with affidavits of Charles F. Curley, L. Brooks Leavitt and R. Randolph Hicks filed.

Apr. 18, 1930.—Order continuing hearing on defendant's petition to reopen case until April 28, 1930; same day order filed.

[fol. 2] Apr. 28, 1930.—Hearing on petition of defendant.

Apr. 28, 1930.—Affidavits of Henry G. Montgomery, Marshall J. Dodge and Robert E. Graham on behalf of plaintiff, filed.

Apr. 30, 1930.—Affidavit of Robert E. Graham on behalf of plaintiff, filed.

May 5, 1930.—Affidavits of L. Brooks Leavitt, H. A. Frey, E. C. Huntington, Jr. and R. Randolph Hicks on behalf of defendant, filed.

June 23, 1930.—Order requesting U. S. Circuit Court of Appeals to remand cause, &c.; same day order filed.

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*NOTE.—Docket entries from institution of suit to filing of record on prior appeal included in transcript of record on that appeal.

For prior docket entries see Appendix, page 1.

June 30, 1930.—Certified copy of order of U. S. Circuit Court of Appeals remanding cause, filed.

June 30, 1930.—Plaintiff's exception to order of June 23, 1930, filed.

June 30, 1930.—Order vacating judgment and reopening cause for purpose of taking new evidence, &c.; same day order filed.

June 30 1930.—Plaintiff's objection to entry of order of June 30, 1930, filed.

Sept. 11, 1930.—Plaintiff's petition for appeal with assignments of error, filed; same day order allowing appeal, bond in the sum of $500; same day bond filed.

Sept. 23, 1930.—Order approving bond of plaintiff on appeal in the sum of $250 with Maryland Casualty Company as surety; same day bond filed.

[fol. 3] Sept. 23, 1930.—Citation issued.

Sept. 24, 1930.—Citation with acceptance of service by attorney for defendant-appellee endorsed thereon, filed.

Oct. 20, 1930.—Præcipe for transcript of record, with acceptance of service by attorney for defendant-appellee endorsed thereon, filed.

[fol. 4] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, MARCH TERM, 1927

No. 25

HENRY G. MONTGOMERY, Plaintiff,

v.

REALTY ACCEPTANCE CORPORATION, Defendant

JUDGMENT

And now, to wit, this first day of May, A. D. 1929, it is considered and adjudged by the Court now here, that the said Henry G. Montgomery, plaintiff, do have and recover of and from the said Realty Acceptance Corporation, defendant, the sum of eighty thousand five hundred dollars ($80,500) and his costs in and about this suit expended, and have execution therefor.

Attest:

(Sgd.) H. C. Mahaffy, Jr., Clerk.

[fol. 4a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1929

No. 4216

REALTY ACCEPTANCE CORPORATION, Defendant-Appellant,

v.

HENRY G. MONTGOMERY, Plaintiff-Appellee

PETITION OF DEFENDANT

Now comes Realty Acceptance Corporation, defendant in the Court below, and appellant herein, and upon the annexed affidavits of R. Randolph Hicks and Charles F. Curley, petitions this Court for leave to make a motion or file a petition in the United States District Court for the District of Delaware, asking said District Court to request this Court to remand this cause and the record herein to the said District Court to the end that the said District Court may on motion of this petitioner, vacate the judgment herein and reopen said cause for the purpose of taking and considering certain newly discovered evidence appearing in the annexed affidavits. Your petitioner verily believes and alleges that the newly discovered evidence appearing in the annexed affidavits shows that the basis of fact upon which the quantum of the judgment herein was determined, was wholly false and without foundation; further that a reconsideration of this cause by the said District Court in the light of such newly discovered evidence is necessary to secure the ends of justice.

Further the petitioner prays that proceedings herein in this Court be stayed until after the United States District Court for the District of Delaware shall have passed upon [fol. 4b] the motion or petition, leave to present which to such District Court is hereby asked.

Respectfully submitted.

Realty Acceptance Corporation, by (Sgd.) Chas. F. Curley, Its Attorney.

[fol. 4c] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4216

[Title omitted]

AFFIDAVIT OF CHARLES F. CURLEY—Filed March 5, 1930

STATE OF DELAWARE,
New Castle County, ss:

Charles F. Curley, being first duly sworn, deposes and says: That in association with R. Randolph Hicks, of the Bar of New York City, New York, he was and is counsel for Realty Acceptance Corporation, the defendant below, and the present petitioner, and that in such capacity he tried such case in the Court below and presented the same on appeal in this Court; that the trial of said cause, a jury being waived, was had on December 18, 1928, and an appeal from the judgment rendered therein was argued by defendant below in this Court on December 9, 1929, and on January 15, 1930, this Court filed an opinion affirming such judgment; that on February 3, 1930, defendant below filed herein a petition for rehearing, no order on which has yet been entered.

That in the Court below, aside from the question of the legal enforceability of the employment contract sued on, the sole question was the quantum of the plaintiff's damages, and this question took the form of to what extent the amount of plaintiff's salary for the balance of the contract [fol. 4d] term of employment should be reduced by his earnings during such period. The testimony as to the plaintiff's earnings and as to his activities and relations with the firm of Palmer & Co. during the balance of the contract term, was solely the testimony of plaintiff and was in no wise controverted. Plaintiff testified that from September 1, 1927, to June 1, 1928, he and Palmer & Co., a stock brokerage firm in New York City, were engaged in a joint speculative account which was managed by plaintiff, and that their investments of capital in such joint account were equal. On the basis that such capital investments were equal, the trial Court held that the one-half portion of the profits from such joint account received by plaintiff constituted a return on his capital invested herein, and was not

to be considered as earnings in reduction of his damages. Further the trial Court expressly held that any portion of the profits of such joint account received by plaintiff in excess of the share received by Palmer & Co. was chargeable to plaintiff as earnings made by him and hence to be considered in reduction of his damages. This, of course, on the basis of equal investments of capital in such joint account. The apt language used by the trial Court clearly shows the proposition there applied:

"The Court: Suppose you and I invest a thousand dollars apiece, and we make $2500. I have selected the stock. I have handled the whole transaction. Now, then, if we divide it on a dollar for dollar basis, we get $1250 apiece; but if you say to me—before we go in, or after we have made a profit—you take out $1500 and give me a thousand dollars, what is that for—that is compensation for the exercise of my judgment and time and can not be a return on my investment, because my dollar has not earned any more than yours in that respect. It seems to me this additional sum is for services." (Rec., Appendix, p. 105.)

[fol. 4e] By the affidavit of Mr. Hicks filed herein it now appears that the plaintiff's investment of capital was but 25 per cent., and that of Palmer & Co. 75 per cent. Under the law as declared by the trial Court, but 25 per cent of the profits of such joint account could be considered as return on plaintiff's invested capital, and the remaining 25 per cent received by him would have been considered compensation for managing such account, and in reduction of his prima facie damages. By such affidavit it further appears that the 50 per cent share of the profits from such joint account received by plaintiff was $142,515.98, the one-half portion of which, namely $71,257.94, in the trial Court's view would have been considered earnings as distinguished from return on capital. Such amount of $71,257.94 would nearly equal the amount of plaintiff's salary for the balance of the contract term, and if the Court below had not been imposed on by plaintiff's untrue testimony in this regard, the verdict allowing as damages the full salary for the balance of the contract period, i. e., $75,000, would have been impossible.

Affiant relied on the truth of plaintiff's testimony at the trial as to his relations with Palmer & Co., and did not

question the truth of such testimony, and had no reason of any kind to suspect the same, until informed by his associate, R. Randolph Hicks, the affiant herein, as to the facts learned by him on January 22, 1930.

(Sgd.) Chas. F. Curley.

Sworn to and subscribed before me this first day of March, A. D. 1930. (Sgd.) Margaret A. Murphy, Notary Public. (Seal.)

[fol. 4f] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

AFFIDAVIT OF R. RANDOLPH HICKS—Filed March 5, 1930

STATE OF NEW YORK,
County of New York, ss:

R. Randolph Hicks, being duly sworn, deposes and says: I am an attorney at law and a member of the firm of Satterlee & Canfield, 49 Wall Street, New York City.

I have had charge of the case of Henry G. Montgomery v. Realty Acceptance Corporation in the United States District Court of Delaware and on appeal to the United States Circuit Court of Appeals for the Third Circuit. I am familiar with the record in that case and since the trial have discovered facts which, in my opinion, show that the judgment entered herein was based on false testimony.

On page 112 of the record (Appendix, p. 112) will be found the following testimony given by Henry G. Montgomery, the plaintiff in this action:

"X Q. Do I understand your answer to mean that the amount actually deducted from the joint profits before the balance was divided between you and Palmer & Company amounted to $1,000 a month; is that what you meant?

[fol. 4g] "A. That is what I meant, yes.

"X Q. Another question, Mr. Montgomery: In this joint account activity between you and Palmer & Company prior to June 1st, 1928, when stocks were purchased for this joint account, was the cost of that purchase borne equally by yourself and by Palmer & Company?

"A. We had an equal risk of capital there.

"X Q. My question is not confined to equal risk of capital, Mr. Montgomery. My question was who contributed the capital necessary for the acquisition of stocks when stocks were purchased for this joint account?

"A. Both of us.

"X Q. Each contributed in equal shares the capital necessary for the acquisition of those stocks?

"A. Yes."

It will be remembered that the controversial fact litigated between the parties in this case was the amount of damages to which Montgomery was entitled for breach of a contract of employment for five years and the evidence above quoted bore upon the value of his services in the handling of a joint account on behalf of himself and Palmer & Company. Judge Morris of the United States Court of Delaware, in delivering his opinion on this question, used the following language (Rec., Appendix, p. 189):

"The plaintiff diligently endeavored to find like employment, but could not. About September 1, 1927, he and Palmer & Co., a New York brokerage house, invested equal sums of money in a speculative account to be managed by plaintiff. Profits and losses were to be shared equally with the exception that plaintiff was to receive monthly from profits before their distribution, the sum of $1,000. This arrangement continued for nine months, during which plaintiff received in that manner from profits, an aggregate of $9,000, in excess of the distributive share of Palmer & Co. On June 1, 1928, plaintiff became one of the partners of [fol. 4h] Palmer & Co. As such he invested in the partnership business the same sum as each of the other partners. He, like they, also gave his time to the partnership. His profits for the five months' period ending December 1, 1928, were $31,743.51. Of this sum between $10,000 and $11,000 was paid. The remainder was paper profit represented by securities owned by the firm. Defendant contends that its prima facie damages should be lessened by the aggregate of the sums of $9,000 and $31,743.51 together with at least the one-fifth part of the latter sum as the estimated earnings of plaintiff for December, 1928. Plaintiff, however, takes the position that the salary to which he

was entitled was a non-speculative income requiring no capital investment, that since the breach he has been unable to obtain an income of like nature and contends that damages for breach of a salary contract may not be mitigated by profits derived from plaintiff's speculation with his capital, regardless of whether such speculation has or has not been under his immediate personal supervision.

"I think this contention sound. * * *

"Though in the distribution of profits arising from the joint speculative account of plaintiff and Palmer & Co. the former was given a bookkeeping priority over the latter in the sum of $9,000, it is clear that the one-half part of that amount arose from plaintiff's speculation with his own capital and that the setting aside for plaintiff from the gross profits was but a practical or bookkeeping way of enabling plaintiff to obtain compensation for his services in the management of the half interest of Palmer & Co., not a separation of profits arising from plaintiff's half interest into those attributable to his personal efforts and those due to his capital. Moreover, it does not appear that plaintiff's speculation could not have been carried on with equal success had the contract not been broken.

"But that the other one-half part of the sum of $9,000, or $4,500, was not a profit flowing immediately from plain- [fol. 4i] tiff's capital is equally clear. Plaintiff received it as compensation for his personal service in managing the half interest of Palmer & Co. in the joint speculative venture. Though it was not salary payable at all events, it was payment for personal services. I think it sufficiently related in character to plaintiff's salary under the contract to enable defendant to obtain the benefit thereof in mitigation of its damages."

It is thus apparent that the Honorable Judge of the District Court considered all disparity in the return respectively to Palmer & Company and Montgomery on the invested capital in this speculative account as compensation for personal services. If Mr. Montgomery made no contribution to the speculative account or contributed a less amount than Palmer & Company, the compensation for services under Judge Morris's decision would be the proportion of the joint profits which Montgomery received in excess of an equal return, to the contributors, on the cap-

ital invested respectively by both of them in the joint account. In other words, all that said Montgomery obtained over and above an equal return with Palmer & Company on his capital was necessarily compensation to Montgomery for his services in operating the joint account.

On or about Wednesday, the twenty-second day of January, 1930, Mr. Frank B. Scott and I had a talk with Mr. Robert E. Graham, a member of the firm of Palmer & Company, at the office of Palmer & Company, and I asked Mr. Graham if there was a written contract existing between Palmer & Company and said Henry G. Montgomery under which a joint account had been operated by Mr. Montgomery for the benefit of Palmer & Company and said Montgomery and thereupon Mr. Graham exhibited to me a written contract by which Palmer & Company agreed to contribute $75,000 and H. G. Montgomery agreed to con- [fol. 4j] tribute $25,000 to a joint account of $100,000 to be used in the operation by said Montgomery of a trading account in unlisted securities. Said contract provided that said Montgomery, out of any profits derived from the operation of the contract, was to withdraw $1,000 per month for necessary expenses and thereafter that the profits of said account were to be equally divided between Palmer & Company on one side and Montgomery on the other, 50 per cent. going to each.

Mr. Graham advised me that pursuant to said written contract office space was allocated to said Montgomery with a staff of clerks and that from the execution of said contract Montgomery had charge of said account and gave his time and attention to its operation. The contract exhibited to me was dated on or about September 1, 1927, and Mr. Graham advised me that it was operative from September 1, 1927, until the 1st of June, 1928. He further advised me that said Montgomery did not contribute the $25,000 promised by him in said contract until January 10, 1928, and that the only fund contributed up to that date in said joint account was the contribution of $75,000 of Palmer & Company. He further stated that the profits of said Montgomery as of January 31, 1928, were at least $25,000. I thereupon asked him the amount of profits made by H. G. Montgomery in the joint account and distributed between Palmer & Company on one side and said Montgomery on the other from the date of its inception, September 1, 1927,

to the date of its conclusion, June 1, 1928, and Mr. Graham replied that such amount was $145,000. Since said conference, Mr. Graham has corrected this statement to the extent that said distributive share of said Montgomery was fixed at $145,827.51, from which was deducted sundry charges amounting to $3,311.63, leaving a net distribution of earnings or profits to said Montgomery from said joint account of $142,515.88. Mr. Graham further advised me [fol. 4k] that on the first day of June, 1928, Mr. Montgomery was admitted as a partner to the firm of Palmer & Company.

It is most respectfully called to the Court's attention that the following facts are to be deduced from the above:

(1) From September 1, 1927, to January 10, 1928, Henry G. Montgomery paid nothing in the joint account and that the profits in that account as of January 31, 1928, amounted to $24,670.50.

(2) That from September 1, 1927, to June 1, 1928, the return to said Montgomery from said joint account was $142,515.88. That Montgomery contributed no portion of the capital on which this account was operated and out of which this large return arose until January, 1928, and then only contributed $25,000, while Palmer & Company contributed $75,000. The $142,515.88 received by Montgomery was one-half of the total profits earned on the investment in the joint account as above set out. The amount received by said Montgomery over and above an equal return on the capital invested by him and the capital invested by Palmer & Company was necessarily compensation for his services in operating the joint account.

It follows that the personal services of said Montgomery to the firm of Palmer & Company between September 1, 1927, and May 31, 1928, yielded an income to him which, under the principles set out by Judge Morris, would reduce the recovery of said Montgomery by at least $71,257.94 and that the false statement of Mr. Montgomery above set out resulted in the perpetration upon the Realty Acceptance Corporation of a fraud.

That the only testimony at the trial concerning Montgomery's activities and earnings subsequent to the alleged breach by defendant was furnished by him and was in

nowise controverted; affiant and associates had no reason [fol. 41] to suspect that such testimony was not true, nor that the books of Palmer & Company, a reputable stock broker firm, would show such testimony to be untrue; that until January 22, 1930, neither affiant nor anyone connected with defendant below knew of or had reason to know of the evidence in the form of the actual transactions between Montgomery and the said firm as shown by the said firm's books and records and by the statements of R. E. Graham as aforesaid a member of such firm; that the testimony of the said R. E. Graham and the evidence shown by the books and records of the said Palmer & Company will be available in this court or in the court below as may be directed or allowed.

(Sgd.) R. Randolph Hicks.

Sworn to before me this twenty-seventh day of February, 1930. (Sgd.) Barent Ten Eyck, Notary Public, New York County. New York County Clerk's No. 237, Reg. No. 1T6A. Kings County Clerk's No. 53, Reg. No. 1202. Bronx County Clerk's No. 33, Reg. No. 3175. Commission expires March 30, 1931. (Seal.)

[fol. 5] CERTIFIED COPY OF ORDER OF APPELLATE COURT—Filed March 27, 1930

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4216

[Title omitted]

The petition of Realty Acceptance Corporation, defendant-appellant in the above-entitled cause, having been presented, argued and considered, leave is given the said defendant-appellant, on this twenty-fifth day of March, A. D. 1930, to make a motion or file a petition in the District Court of the United States for the District of Delaware asking the said District Court, at its option, to request this court to remand this cause and the record therein to the said District Court to the end that it may, if persuaded by

the defendant-petitioner, vacate the judgment therein and reopen said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment; and

It is ordered that the proceedings in this cause now pending in this court be stayed until after the District Court of the United States for the District of Delaware shall have heard and decided the defendant-appellant's proposed motion or petition and, if allowed, until it shall have finally acted upon the matters raised thereby.

Victor B. Woolley, Circuit Judge.

[fol. 6] Endorsements: 4216. Order Staying Proceedings pending Petition to District Court. Received & Filed Mar. 26, 1930. William P. Rowland, Clerk.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 7] In United States District Court

[Title omitted]

Notice—Filed April 10, 1930

To Robert H. Richards, Esq., Aaron Finger, Esq., and Carl Ehlermann, Esq., Attorneys for Henry G. Montgomery, Plaintiff in the Above-named Suit, duPont Building, Wilmington, Delaware:

Please take notice that on Thursday, the tenth day of April, 1930, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the United States District Court, for the District of Delaware, at Wilmington, Delaware, a petition with affidavits attached, a copy of which petition and affidavits is now handed you, will be presented to such Court for its favorable consideration.

Yours, etc., (Sgd.) Chas. F. Curley, Attorney for Realty Acceptance Corporation, the Above-named Defendant.

Dated Wilmington, Delaware, April 4, 1930.

[fol. 8] Receipt of a copy of the annexed notice and of the petition and affidavits therein mentioned is acknowledged this fourth day of April, 1930.

(Sgd.) Robt. H. Richards, (Sgd.) Aaron Finger, Attorneys for Henry G. Montgomery, the Above-named Plaintiff.

IN UNITED STATES DISTRICT COURT

PETITION OF DEFENDANT—Filed April 10, 1930

To the District Court of the United States for the District of Delaware:

Your petitioner, Realty Acceptance Corporation, defendant in the above-entitled case, respectfully represents:

1. That the above-captioned suit was at law to recover damages for the breach of an employment contract entered into by the defendant and plaintiff; that such case was tried in this court, a jury being waived, on December 18, 1928, and an appeal from the judgment rendered therein against the defendant was thereafter argued by defendant in the Court of Appeals for the Third Circuit, and on January 15, 1930, the said Court of Appeals for the Third Circuit filed an opinion to the effect that such judgment should be affirmed; that on February 3, 1930, your petitioner filed in the said Court of Appeals for the Third Circuit a petition for rehearing, no order on which has yet been entered.

2. That on the twenty-second day of January, 1930, in the manner described in the affidavits hereto attached, petitioner learned that certain testimony of the plaintiff at the [fol. 9] trial in the said District Court was false; that thereafter this petitioner on the fifth day of March, 1930, presented to the United States Circuit Court of Appeals for the Third Circuit its petition, atached to which was the affidavit of R. Randolph Hicks setting forth the newly discovered evidence showing such trial testimony of plaintiff to have been false, and setting forth also the time and manner in which such newly discovered evidence came to the affiant's knowledge. It was also made to appear to the Circuit Court of Appeals for the Third Circuit by the

affidavit of Mr. Hicks and of Charles F. Curley, that the said trial testimony of plaintiff was in no wise controverted by any testimony offered at the said trial by this petitioner, and that neither this petitioner nor anyone connected with it had any reason to suspect the truth of such trial testimony until the time stated in the affidavit of Mr. Hicks; it was also thereby made to appear to the Circuit Court of Appeals that the newly discovered evidence was material in that under the applicable law as stated by the said District Court, the quantum of the judgment rendered therein would have been substantially less if such applicable principle of law had been applied to the true facts.

3. That on the twenty-fifth day of March, 1930, the United States Circuit Court of Appeals for the Third Circuit, entered the following order on the said petition presented to is as aforesaid by this petitioner:

"The petition of Realty Acceptance Corporation, defendant-appellant in the above entitled cause, having been presented, argued and considered, leave is given the said defendant-appellant, on this twenty-fifth day of March, A. D. 1930, to make a motion or file a petition in the District Court of the United States for the District of Delaware asking the said District Court, at its option, to request this Court to remand this cause and the record therein to [fol. 10] the said District Court to the end that it may, if persuaded by the defendant-petitioner, vacate the judgment therein and re-open said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment; and

"It is ordered that the proceedings in this cause now pending in this Court be stayed until after the District Court of the United States for the District of Delaware shall have heard and decided the defendant-appellant's proposed motion or petition and, if allowed, until it shall have finally acted upon the matters raised thereby."

That petitioner is informed that a certified copy of said order has been transmitted to this Court by the clerk of the said Circuit Court of Appeals for the Third Circuit and filed in this cause.

4. That petitioner annexes to this petition the affidavits of J. Brooks Leavitt and of R. Randolph Hicks, both of

the City and State of New York, and of Charles F. Curley, of the City of Wilmington, Delaware, which affidavits show the substance of the evidence first learned by this petitioner on January 22, 1930, by which it appears that material testimony given in this court by the said plaintiff at the said trial was false, as well as material on the quantum of the judgment as aforesaid rendered in this court, and showing the manner in which the said evidence first came to the knowledge of this petitioner; and the petitioner represents to this Court that if given the opportunity here asked, it will produce in this court the evidence described in the said affidavits showing as aforesaid the falsity of the said testimony given at the trial herein.

5. That the ends of justice require that the aforesaid judgment rendered in this court be vacated and that the said cause be reopened for the purpose of taking and dis-
[fol. 11] covering the said newly discovered evidence.

Wherefore your petitioner prays this Court to request the United States Circuit Court of Appeals for the Third Circuit to remand said cause and the record herein to this Court to the end that this Court may vacate the judgment as aforesaid entered in this court and reopen said cause for the purpose of taking and considering the newly discovered evidence described in the affidavits hereto attached.

And your petitioner further prays such further relief in the premises as to this Court may seem just and lawful.

Realty Acceptance Corporation, by (Sgd.) Chas. F. Curley, Its Attorney.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHARLES F. CURLEY ON BEHALF OF DEFENDANT —Filed April 10, 1930

STATE OF DELAWARE,
New Castle County, ss:

Charles F. Curley, being first duly sworn, deposes and says: That in association with R. Randolph Hicks of the bar of New York City, New York, he was and is counsel for Realty Acceptance Corporation, the above defendant and

the present petitioner, and that in such capacity he tried such case in this court and presented the same on appeal in the United States Court of Appeals; that the trial of said [fol. 12] cause, a jury being waived, was had on December 18, 1928, and an appeal from the judgment rendered therein was argued by defendant in the Court of Appeals on December 9, 1929, and on January 15, 1930, the Court of Appeals filed an opinion to the effect that such judgment should be affirmed; that on February 3, 1930, defendant filed in the said Court of Appeals, a petition for rehearing, no order on which has yet been entered.

That at the trial in this court, aside from the question of the legal enforceability of the employment contract sued on, the sole question was the quantum of the plaintiff's damages, and this question took the form of to what extent the amount of plaintiff's salary for the balance of the contract term of employment should be reduced by his earnings during such period. The testimony as to the plaintiff's earnings and as to his activities and relations with the firm of Palmer & Co. during the balance of the contract term, was solely the testimony of plaintiff and was in no wise controverted. Plaintiff testified that from September 1, 1927, June 1, 1928, he and Palmer & Co., a stock brokerage firm in New York City, were engaged in a joint speculative account which was managed by plaintiff, and that their investments of capital in such joint account were equal. On the basis that such capital investments were equal, this Court held that the one-half portion of the profits from such joint account received by plaintiff constituted a return on his capital invested therein, and was not to be considered as earnings in reduction of his damages. Further, this Court expressly held that any portion of the profits of such joint account received by plaintiff in excess of the share received by Palmer & Co. was chargeable to plaintiff as earnings made by him and hence to be considered in reduction of his damages. This of course on the basis of equal investments of capital in such joint account. The apt [fol. 13] language used by this Court clearly shows the proposition there applied:

"The Court: Suppose you and I invest a thousand dollars apiece, and we make $2500. I have selected the stock. I have handled the whole transaction. Now then, if we

divide it on a dollar for dollar basis, we get $1250 apiece; but if you say to me—before we go in, or after we have made a profit—you take out $1500 and give me a thousand dollars, what is that for—that is compensation for the exercise of my judgment and time and cannot be a return on my investment, because my dollar has not earned any more than yours in that respect. It seems to me this additional sum is for services." (Rec., p. 105.)

By the affidavit of Mr. Hicks filed herein it now appears that the plaintiff's investment of capital was but 25 per cent., and that of Palmer & Co. 75 per cent. Under the law as declared by this Court, but 25 per cent of the profits of such joint account could be considered as return on plaintiff's invested capital, and the remaining 25 per cent received by him would have been considered compensation for managing such account, and in reduction of his prima facie damages. By such affidavit it further appears that the 50 per cent share of the profits from such joint account received by plaintiff was $142,515.98, the one-half portion of which, namely $71,257.94, in this Court's view would have been considered earnings as distinguished from return on capital. Such amount of $71,257.94 would nearly equal the amount of plaintiff's salary for the balance of the contract term, and if this Court had not been imposed on by plaintiff's untrue testimony in this regard, the verdict allowing as damages the full salary for the balance of the contract period, i. e., $75,000 would have been impossible.

[fol. 14] Affiant relied on the truth of plaintiff's testimony at the trial as to his relations with Palmer & Co., and did not question the truth of such testimony, and had no reason of any kind to suspect the same, until informed by his associate, R. Randolph Hicks, the affiant herein, as to the facts learned by him on January 22, 1930.

(Sgd.) Chas. F. Curley.

Sworn to and subscribed before me this fourth day of April, A. D. 1930. (Sgd.) Margaret A. Murphy, Notary Public. (Seal.)

In United States District Court

Affidavit of L. Brooks Leavitt on Behalf of Defendant —Filed April 10, 1930

State of New York,
County of New York, ss:

L. Brooks Leavitt, being duly sworn, deposes and says: I am a resident of the City of New York and a member of the firm of Paine, Webber & Company, investment bankers with offices at 25 Broad Street, New York City. I am a director of the Realty Acceptance Corporation and testified in the trial of this cause before the Honorable Hugh M. Morris at the trial on the eighteenth day of December, 1928.

On or about the fifteenth day of January, 1930, Mr. Marshall J. Dodge, a member of the partnership of Palmer & Company, investment bankers with offices at No. 61 Broadway, New York City, called me over the telephone and asked for an appointment. The appointment was made [fol. 15] and soon thereafter he came to my office and told me that he was curious to read the testimony in the above case and asked me for a copy of it. I obtained for him from Mr. R. Randolph Hicks, of the firm of Satterlee & Canfield, a copy of the transcript of record in said case as the same was submitted to the United States Circuit Court of Appeals for the Third Circuit. Some days after the delivery of said record to Mr. Dodge, he told me that the testimony of Mr. H. G. Montgomery was in certain respects incorrect. I asked him if he would give me the details as to the incorrect statements, and he thereupon told me that his partner, Mr. Robert E. Graham, would do so. I explained to him that if any of such testimony was incorrect I would like my counsel, Mr. R. Randolph Hicks, to know of it, and as a result of this conversation I arranged an interview between Mr. Robert E. Graham and Mr. Hicks, which I understand was held on or about the twenty-second day of January, 1930, but at which I was not personally present.

(Sgd.) L. Brooks Leavitt.

Sworn to before me this second day of April, 1930. (Sgd.) R. Vernon Smith, Notary Public, Nassau County. New York County Clerk's No. 654. Commission expires March 30, 1932. (Seal.)

[fol. 16] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. RANDOLPH HICKS ON BEHALF OF DEFENDANT —Filed April 10, 1930

STATE OF NEW YORK,
County of New York, ss:

R. Randolph Hicks, being duly sworn, deposes and says: I am an attorney at law and a member of the firm of Satterlee & Canfield, 49 Wall Street, New York City.

I have had charge of the case of Henry G. Montgomery v. Realty Acceptance Corporation in the United States District Court of Delaware and on appeal to the United States Circuit Court of Appeals for the Third Circuit. I am familiar with the record in that case and since the trial have discovered facts which, in my opinion, show that the judgment entered herein was based on false testimony.

On page 112 of the record will be found the following testimony given by Henry G. Montgomery, the plaintiff in this action:

"X Q. Do I understand your answer to mean that the amount actually deducted from the joint profits before the balance was divided between you and Palmer & Company amounted to $1000 a month; is that what you meant?

"A. That is what I meant, yes.

"X Q. Another question, Mr. Montgomery: In this joint account activity between you and Palmer & Company prior to June 1st, 1928, when stocks were purchased for this joint account, was the cost of that purchase borne equally by yourself and by Palmer & Company?

"A. We had an equal risk of capital there.

"X Q. My question is not confined to equal risk of capital, Mr. Montgomery. My question was who contributed [fol. 17] the capital necessary for the acquisition of stocks when stocks were purchased for this joint account?

"A. Both of us.

"X Q. Each contributed in equal shares the capital necessary for the acquisition of those stocks?

"A. Yes."

It will be remembered that the controversial fact litigated between the parties in this case was the amount of

damages to which Montgomery was entitled for breach of a contract of employment for five years and the evidence above quoted bore upon the value of his services in the handling of a joint account on behalf of himself and Palmer & Company. Judge Morris, of the United States Court of Delaware, in delivering his opinion on this question, used the following language:

"The plaintiff diligently endeavored to find like employment, but could not. About September 1, 1927, he and Palmer & Co., a New York brokerage house, invested equal sums of money in a speculative account to be managed by plaintiff. Profits and losses were to be shared equally with the exception that plaintiff was to receive monthly from profits before their distribution, the sum of $1000. This arrangement continued for nine months, during which plaintiff received in that manner from profits, an aggregate of $9000 in excess of the distributive share of Palmer & Co. On June 1, 1928, plaintiff became one of the partners of Palmer & Co. As such he invested in the partnership business the same sum as each of the other partners. He, like they, also gave his time to the partnership. His profits for the five months' period ending December 1, 1928, were $31,743.51. Of this sum between $10,000 and $11,000 was paid. The remainder was paper profit represented by securities owned by the firm. Defendant contends that its prima facie damages should be lessened by the aggregate of the sums of $9000 and $31,743.51 together with at least [fol. 18] the one-fifth part of the latter sum as the estimated earnings of plaintiff for December, 1928. Plaintiff, however, takes the position that the salary to which he was entitled was a non-speculative income requiring no capital investment, that since the breach he has been unable to obtain an income of like nature and contends that damages for breach of a salary contract may not be mitigated by profits derived from plaintiff's speculation with his capital, regardless of whether such speculation has or has not been under his immediate personal supervision."

"I think this contention sound. * * *"

"Though in the distribution of profits arising from the joint speculative account of plaintiff and Palmer & Co. the former was given a bookkeeping priority over the latter in the sum of $9000, it is clear that the one-half part of

that amount arose from plaintiff's speculation with his own capital and that the setting aside for plaintiff from the gross profits was but a practical or bookkeeping way of enabling plaintiff to obtain compensation for his services in the management of the half interest of Palmer & Co., not a separation of profits arising from plaintiff's half interest into those attributable to his personal efforts and those due to his capital. Moreover, it does not appear that plaintiff's speculation could not have been carried on with equal success had the contract not been broken.

"But that the other one-half part of the sum of $9000 or $4500, was not a profit flowing immediately from plaintiff's capital is equally clear. Plaintiff received it as compensation for his personal service in managing the half interest of Palmer & Co. in the joint speculative venture. Though it was not salary payable at all events, it was payment for personal services. I think it sufficiently related in character to plaintiff's salary under the contract to enable defendant to obtain the benefit thereof in mitigation of its damages."

[fol. 19] It is thus apparent that the Honorable Judge of the District Court considered all disparity in the return respectively to Palmer & Company and Montgomery on the invested capital in this speculative account as compensation for personal services. If Mr. Montgomery made no contribution to the speculative account or contributed a less amount than Palmer & Company, the compensation for services under Judge Morris' decision would be the proportion of the joint profits which Montgomery received in excess of an equal return, to the contributors, on the capital invested respectively by both of them in the joint account. In other words, all that said Montgomery obtained over and above an equal return with Palmer & Company on his capital was necessarily compensation to Montgomery for his services in operating the joint account.

On or about the twenty-first day of January, 1930, Mr. Brooks Leavitt, of the firm of Paine, Webber & Company, advised me that he had been told by Mr. Marshall J. Dodge, of the firm of Palmer & Company, that the statements made by Henry G. Montgomery while on the witness stand in the above case were incorrect and that said Montgomery had misstated the arrangement between him and Palmer &

Company by which a joint account had been conducted by said Henry G. Montgomery. Mr. Leavitt further advised me that Mr. Robert E. Graham of the firm of Palmer & Company would give me the details as to the misstatements by said Montgomery. He thereupon made an engagement by which I was to meet Mr. Graham at Mr. Graham's office on the following morning, and, pursuant to this appointment, on or about Wednesday, January 22, 1930, Mr. Frank B. Scott and I met Mr. Robert E. Graham, a member of the firm of Palmer & Company, 61 Broadway. I asked Mr. [fol. 20] Graham if there was a written contract existing between Palmer & Company and said Henry G. Montgomery under which a joint account had been operated by Mr. Montgomery for the benefit of Palmer & Company and said Montgomery and thereupon Mr. Graham exhibited to me a written contract by which Palmer & Company agreed to contribute $75,000 and H. G. Montgomery agreed to contribute $25,000 to a joint account of $100,000 to be used in the operation by said Montgomery of a trading account in unlisted securities. Said contract provided that said Montgomery, out of any profits derived from the operation of the contract, was to withdraw $1000 per month for necessary expenses and thereafter that the profits of said account were to be equally divided between Palmer & Company on one side and Montgomery on the other, 50 per cent going to each.

Subsequently, I asked Mr. Graham if he would put the facts above detailed in form of an affidavit which I wished to use in the Circuit Court of Appeals and the matter was referred to his counsel who showed me an excerpt from the books of Palmer & Company which disclosed the profits as above set out and at the same time told me that, while Mr. Graham would respond to any summons of the court, he was unwilling to volunteer an affidavit.

Mr. Graham advised me that pursuant to said written contract office space was allocated to said Montgomery with a staff of clerks and that from the execution of said contract Montgomery had charge of said account and gave his time and attention to its operation. The contract exhibited to me was dated on or about September 1, 1927, and Mr. Graham advised me that it was operative from September 1, 1927, until the first of June, 1928. He further advised me that said Montgomery did not contribute the $25,000 prom-

[fol. 21] vised by him in said contract until January 10, 1928, and that the only fund contributed up to that date in said joint account was the contribution of $75,000 of Palmer & Company. He further stated that the profits of said Montgomery as of January 31, 1928, were at least $25,000. I thereupon asked him the amount of profits made by H. G. Montgomery in the joint account and distributed between Palmer & Company on one side and said Montgomery on the other from the date of its inception, September 1, 1927, to the date of its conclusion, June 1, 1928, and Mr. Graham replied that such amount was $145,000. Since said conference, Mr. Graham has corrected this statement to the extent that said distributive share of said Montgomery was fixed at $145,827.51, from which was deducted sundry charges amounting to $3311.63, leaving a net distribution of earnings or profits to said Montgomery from said joint account of $142,515.88. Mr. Graham further advised me that on the first day of June, 1928, Mr. Montgomery was admitted as a partner to the firm of Palmer & Company.

It is most respectfully called to the Court's attention that the following facts are to be deduced from the above:

(1) From September 1, 1927 to January 10, 1928, Henry G. Montgomery paid nothing in the joint account and that the profits in that account as of January 31, 1928, amounted to $24,670.50.

(2) That from September 1, 1927 to June 1, 1928, the return to said Montgomery from said joint account was $142,515.88. That Montgomery contributed no portion of the capital on which this account was operated and out of which this large return arose until January, 1928, and then only contributed $25,000 while Palmer & Company contributed $75,000. The $142,515.88 received by Montgomery [fol. 22] was one-half of the total profits earned on the investment in the joint account as above set out. The amount received by said Montgomery over and above an equal return on the capital invested by him and the capital invested by Palmer & Company was necessarily compensation for his services in operating the joint account.

It follows that the personal services of said Montgomery to the firm of Palmer & Company between September 1, 1927 and May 31, 1928, yielded an income to him which, under

the principles set out by Judge Morris, would reduce the recovery of said Montgomery by at least $71,257.94 and that the false statement of Mr. Montgomery above set out resulted in the perpetration upon the Realty Acceptance Corporation of a fraud.

That the only testimony at the trial concerning Montgomery's activities and earnings subsequent to the alleged breach by defendant was furnished by him and was in nowise controverted; affiant and associates had no reason to suspect that such testimony was not true, nor that the books of Palmer & Company, a reputable stock broker firm, would show such testimony to be untrue; that until January 22, 1930, neither affiant nor anyone connected with defendant below knew of or had reason to know of the evidence in the form of the actual transactions between Montgomery and the said firm as shown by the said firm's books and records and by the statements of R. E. Graham, as aforesaid, a member of such firm; that the testimony of the said R. E. Graham and the evidence shown by the books and records of the said Palmer & Company will be available in this Court as may be directed or allowed.

(Sgd.) R. Randolph Hicks.

[fol. 23] Sworn to before me this second day of April, 1930. (Sgd.) Lloyd F. Thanhouser, Notary Public. Notary Public, Queens County. Queens Co. Clks.' No. 3617, Reg. No. 9072. N. Y. Co. Clks.' No. 417, Reg. No. 1T300. Commission expires March 30, 1931. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HENRY G. MONTGOMERY ON BEHALF OF PLAINTIFF—Filed April 28, 1930

STATE OF NEW YORK,
County of New York, ss:

Henry G. Montgomery, being duly sworn, deposes and says:

I am a resident of New York City and am the plaintiff herein. I have read defendant's petition and affidavits to reopen this case and file this affidavit in opposition.

This effort of the defendant to escape the judgment against it for premeditated breach of contract with me has assumed the additional aspect of a sharp and wholly unwarranted attack on my credibility and indeed on my integrity, and justifies and demands a brief answer from me.

Any charge that the judgment rendered in my favor was obtained by false testimony or by imposing on this court is completely refuted in the record before this court. To state that my testimony as to the equal contribution of capital was false is to state and to claim what is not so. A mere reading of the testimony which I gave upon the trial [fol. 24] clearly demonstrates that at the time of the trial I was testifying according to my recolleciton of the contents of a written instrument made more than a year before. I distinctly stated (Rec., p. 114) on cross-examination as to whether the capital was contributed in equal shares by myself and Palmer & Company, that "without looking at the books that would certainly be my impression," and again (Rec., p. 113) that "I had a certain amount of capital that was deposited with the firm, and that amount was, as far as I recall it, at all times sufficient to take up one-half of the amount necessary for the operations." The record, moreover, further shows (Rec., p. 101) that I personally volunteered the information to defendant that my arrangement with Palmer & Company "was all covered on a half sheet of typewriting" and thus advised it upon the trial of the fact, which it now apparently contends was "newly discovered" on January 22, 1930, that a written contract existed between Palmer & Company and me covering our joint account.

In preparing the case for trial, my attorneys advised me that profits from speculation and involving the use and risk of my capital could not be used in mitigation of damages under my salary contract and that figures and details were immaterial. In preparing the case, neither the memorandum concerning the speculative account nor the partnership agreement were at any time examined or on hand. In fact, as far as I recall, I had not re-read the joint account memorandum after the time when it was executed.

I did not examine the books of the speculative joint account before the trial and gave my best recollection concerning them.

The account was informally handled. At the beginning of September, my securities in my account with Palmer & Company had an actual market value of about $127,000 and [fol. 25] I owed about $34,000 to the firm, leaving an actual liquidation value of about $93,000. By January, however, I had sold securities, and had a cash credit. The firm then transferred $25,000 out of my brokerage account into the joint account. At the same time the firm transferred $75,000 on its books into the joint account. No special bank account was opened and these were merely bookkeeping matters, but the liquidating value or cash balance in my account, constituted actual additions to the resources of the firm, but the firm's contribution did not affect the firm's resources.

A capital of $25,000 was sufficient at that time to finance a transaction of $100,000.

No compensation or salary to me was discussed or contemplated in any way. I suggested to Palmer & Company the division of pool profits and they accepted.

As far as I recall, there was only one distribution and profits in the account accumulated continually.

In view of this attack on my credibility as a witness and upon my integrity, I attach copies of letters and testimonials received before I became president of the defendant and submitted by me before my election as president, to some of the parties interested in the information of defendant (and one letter received shortly afterwards).

(Sgd.) Henry G. Montgomery.

Subscribed and sworn to before me this twenty-eighth day of April, 1930. (Sgd.) John R. Hawtherne, Notary Public. Notary Public, Queens County. County Clerk's No. 766, Reg. No. 783. New York Co. Clerk's No. 116, Reg. No. 2 H 50. Commission expires March 30, 1932.

[fol. 26] Elbert H. Gary, 71 Broadway, New York

Dear Sir: This letter will serve to introduce Major H. G. Montgomery, whom I have favorably known for a number of years. I should like to have you talk with him sufficiently to be able to make up your mind in regard to his qualifications and then decide whether or not it would be advisable from your standpoint to connect him with your

export business. I think he has the natural talent and the right experience to enable him to make a success in any line which he determines, after full investigation and study, he could adapt himself to. Before you reach any conclusion I will be glad to see you and tell you what I know of him in a general way, all with the hope that something practical may come out of the inquiry.

Yours truly, (Signed) E. H. Gary.

Mr. E. P. Thomas, President U. S. Steel Products Co., 30 Church Street, New York, N. Y.

[fol. 27] New York Telephone Company, 15 Dey Street

New York, September 30, 1924.

Mr. H. G. Montgomery, President Realty Acceptance Corporation, 331 Madison Avenue, New York City, N. Y.

My Dear Mr. Montgomery: Your letter of September 24 tendering your resignation was received upon my return from Canada.

I congratulate you upon having completed the organization of the Realty Acceptance Corporation and upon your election as its first President. I think you are exceptionally well qualified to manage a business of this type successfully and feel that your company is fortunate in having obtained your services in the capacity of its chief executive officer.

I appreciate keenly your kindly personal references and in turn wish to say that my association with you throughout the time you have so ably served this company has been most cordial and of a valuable character.

Faithfully yours, J. S. McCullough, President.

[fol. 28] GLD/HN 1-210

War Department, The Adjutant General's Office, Washington

April 18, 1923.

A. G. 201 Montgomery, Henry G. (2-23-23) WW.

Captain Henry G. Montgomery, 324 West 108th Street, New York, N. Y.

My Dear Captain Montgomery: I take pleasure in informing you that, by direction of the President, under the

provisions of the act of Congress approved July 9, 1918, as amended by the act of Congress approved April 7, 1922, the distinguished-service medal has been awarded to you.

The Quartermaster General of the Army has been directed to forward the distinguished-service medal to the Commanding General, Second Corps Area, Governors Island, N. Y., for presentation, and any correspondence relative to the matter should be conducted with that officer.

Very truly yours, Robert C. Davis, The Adjutant General, by —— ——. B.

[fol. 29] Whitman, Ottinger & Ransom, 120 Broadway, New York

October 30, 1919.

The Honorable the Secretary of War, Washington, D. C.

My Dear Mr. Secretary: During the summer of 1915, Mr. Henry G. Montgomery, a citizen of the City of New York, in an effort to develop an interest in preparedness, offered to present to the State of New York, a battery of armored cars of the most improved type known at that time.

This offer was accepted by me on behalf of the State and Mr. Montgomery was commissioned a Captain in the National Guard and given command of this organization, in which post he remained until he entered the Federal Service for the purpose of going to France.

During all of this service his activities in connection with this work came under my observation. He brought to this work a farsighted conception of the National needs at that time, displaying a capacity for organization and tireless devotion to duty that was a distinct aid in forwarding the preparedness movement in this State.

I am glad to commend his activities and to recommend him for your consideration.

Very truly yours, (Signed) Charles S. Whitman.

[fol. 30] Headquarters 27th Division N. Y. N. G., Office of the Division Commander, Room 829 Municipal Building, New York City

January 9, 1923.

Subject: Recommendation of Captain Henry G. Montgomery for award of Distinguished Service Medal.

To the Adjutant General of the Army:

1. Captain Henry G. Montgomery, Field Artillery, 27th Division, has distinguished himself by exceptionally meritorious service to the Government in a duty of great responsibility.

2. At the beginning of the war, Captain Montgomery by his remarkable foresight visualized the importance of perfecting the armoured tank for offensive warfare and personally assumed the great responsibility of organizing from private resources the first battery of such cars built in America and offered it to the United States Government. It was not accepted at the time, but was later taken over by the War Department from the State of New York. From 1915 until his regiment was ordered to France, he worked continually in the interest of building up an American Tank Corps. He brought his views repeatedly and forcefully before the authorities of the War Department, Congress and the American people thereby greatly developing interest in preparedness and increasing public sentiment for necessary legislation.

3. With sound judgment and a keen perception of the approaching national needs, he recruited and organized a large force of technically educated men and so conducted their thorough training and instruction that upon the outbreak of the war they were immediately available as offi- [fol. 31] cers in the Army and were so commissioned. In other words, at a time when every military asset was of the greatest value, Captain Montgomery was prepared to and did make a very great contribution of accomplishment in men and material to the Army.

4. In France as a Captain of Field Artillery, he served throughout the operations of the 52pd Field Artillery Brigade. At St. Mihiel and throughout the Meuse-Argonne offensive he was charged with the responsibility of maintaining while in action the mechanical efficiency of the newly issued French material forming the heavy artillery of the 33rd and 79th Divisions. In this work he displayed technical skill and resourcefulness of a high order, reducing to a minimum the loss in firing operations of his brigade.

5. There are enclosed herewith true copies of letters written by Brig. General George Albert Wingate, com-

manding 52nd Field Artillery Brigade, commending Captain Montgomery.

6. I cannot help but feel that the recognition of such service is important at this time in view of the effort now being made by the Secretary of War and others to develop public sentiment for an army of adequate peace-time strength. In a recent address delivered before the New York Post of the Army Ordinance Association, Mr. Weeks spoke of the unprepared condition of the Army at the beginning of the World War. Referring to the fact "that not an American manufactured tank reached the battle front," he said: "Of course we could not have entered the war without the loss of men and the expenditures of large [fol. 32] amounts of money, but if we had been prepared, the World War would have ended sooner, our loss of life would not have been so great, and many millions of dollars would not have been wasted in unproductive activities." This need for more modern equipment in our military establishment was not only visualized by Captain Montgomery, but he rendered very valuable aid and cooperation towards its attainment and in so doing he undoubtedly distinguished himself by exceptionally meritorious service to the government in this duty of great responsibility. To refuse to recognize services of this character is to discourage constructive patriotism of a high order and to make more difficult the problem of increasing public sentiment for an army of adequate strength.

7. It is therefore recommended that the Distinguished Service Medal be awarded Captain Henry G. Montgomery, Field Artillery, 27th Division, for exceptionally meritorious and distinguished services. By his remarkable foresight he visualized the necessity of perfecting the armoured tank for offensive warfare and personally assumed the great responsibility of organizing and equipping from private resources the first unit of such cars built in America, and offered it to the United States Government. He subsequently recruited and organized on his own responsibility a large number of technically educated men who were quickly available for appointment as commissioned officers and were so utilized by the United States Government. Later he served with marked credit with the 52nd Field Artillery Brigade in the St. Mihiel and Meuse-Argonne

Offensive. He displayed a remarkable conception of the necessity for armoured tank development, and by his unflagging zeal and patriotic devotion to duty he rendered [fol. 33] services of inestimable value to the American Expeditionary Forces. Address: 1 East 60th Street, New York City.

(Signed) John F. O'Ryan, Major General.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MARSHALL J. DODGE ON BEHALF OF PLAINTIFF—Filed April 28, 1930

STATE OF NEW YORK,
County of New York, ss:

Marshall J. Dodge, being duly sworn, says:

I am a resident of New York City and a member of Palmer & Company. Mr. Montgomery withdrew from the firm on June 1, 1929, and announcement was made in the daily papers.

I have known Mr. Brooks Leavitt, of Paine, Webber & Company, for many years.

I have read Mr. Leavitt's affidavit in this suit. My appointment with Mr. Leavitt took place in the second half of December, 1929, and had nothing to do with Mr. Montgomery's suit against the Realty Acceptance Corporation.

In December (and at other times) Palmer & Company owned stock of General Bond & Share Company. This company had acquired control of Realty Acceptance Corporation and in December, 1929, stockholders of the General Bond & Share Company had an opportunity to exchange their stock for stock in another company. Paine, Webber & Company were active in the affairs of the General Bond & Share Company and, as I knew partners in Paine, Webber & Company, my partner, Mr. Robert E. [fol. 34] Graham, suggested that I make an appointment with Mr. Leavitt and obtain further information about the exchange of stock. I did so and saw Mr. Leavitt at his office solely for that purpose.

At the conference we discussed the affairs of the General Bond & Share Company and the proposed exchange. Mr.

Leavitt talked to me at length about the Realty Acceptance Corporation and Mr. Montgomery's suit. He told me he had attended the trial, that he had always questioned Mr. Montgomery's testimony at some points concerning Palmer & Company, but that he had decided not to bother Palmer & Company. He also told me that one of his partners had urged him to see Palmer & Company and had told him that we would no doubt give him any desired information but that Mr. Leavitt told me that he had refused this request and had refused to draw Palmer & Company into the suit. He asked me whether I had read the record and I told him I had not but would do so if he would send me a copy. Shortly after that he sent me a copy of the record.

On December 27, 1929, I wrote Mr. Leavitt and returned the record to him and told him there was some inaccuracy in Mr. Montgomery's testimony, and that my partner, Mr. Graham, would be glad to see him if Mr. Leavitt wanted to. A copy of said letter of December 27, 1929, is attached hereto and made a part of this affidavit. About January 22, 1930, Mr. Graham told me Mr. Leavitt had written him asking for an appointment for his attorney.

(Sgd.) Marshall J. Dodge.

[fol. 35] Sworn to before me this twenty-fourth day of April, 1930. (Sgd.) K. A. Sheridan, Notary Public. Notary Public, New York County. New York County Clerk's No. 268. New York Register's No. 1S297. Commission expires March 30, 1931. (Seal.)

(Copy)

Palmer & Company, 61 Broadway, New York

December 27th, 1929.

Mr. L. Brooks Leavitt, Paine Webber & Company, 25 Broad Street, New York City.

Dear Mr. Leavitt: I am enclosing you the papers in the Montgomery Realty Corporation suit which you so kindly loaned me yesterday, together with the letter addressed to you by E. C. Huntington, Jr.

There are a number of inaccuracies in Mr. Montgomery's testimony insofar as his relations with Palmer and Company are concerned.

If it would be helpful, Mr. Graham would be glad at any time to see Mr. Huntington and tell him exactly what relationship existed, particularly prior to Mr. Montgomery's entrance into this firm, in connection with the joint account referred to in his testimony.

Very truly yours, ——. ——.

MJD:LM.

[fol. 36] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ROBERT E. GRAHAM ON BEHALF OF PLAINTIFF—Filed April 28, 1930

STATE OF NEW YORK,
County of New York, ss:

Robert E. Graham, being duly sworn, says:

I am a resident of New York City and a member of the firm of Palmer & Company.

In the summer of 1927, Mr. Henry G. Montgomery, who was a customer of ours, having a desk at our Wall Street office, proposed the conduct of a special account in bank stocks and other securities employing his own capital, and invited us to participate in this account. This we agreed to do, contributing certain of our capital and credit and the facilities of our office. The profits of the account, after deducting expenses, were to be divided upon a basis suggested by Mr. Montgomery, namely, the first $1000 of profit to Mr. Montgomery and the balance to be equally divided. No compensation or salary was discussed or contemplated and Palmer & Company would not have participated in this speculative account had Mr. Montgomery not contributed capital.

At the closing on August 31, 1927, Mr. Montgomery had a debit balance with us in his customer's account of $34,649, but the securities in his account had a market value of $127,260. In January, 1928, Mr. Montgomery transferred $25,000 out of his customer's account into the

joint account and on the same day Palmer & Company transferred $75,000 by book credit to the joint account, no special bank account being opened. The speculative account had been operating from September on, and Palmer & Company furnished the necessary capital in varying amounts.

[fol. 37] As stated in the affidavit of Marshall J. Dodge, dated April 24th, 1930, in December, 1929, Palmer & Company was the owner of stock of the General Bond & Share Company, which had previously acquired control of Realty Acceptance Corporation. Stockholders of the General Bond & Share Company were offered an opportunity to exchange their stock for shares in another company, and Paine, Webber & Company were active in the transaction. As Palmer & Company desired certain information with respect to the transaction, I suggested to my partner, Marshall J. Dodge, who was personally acquainted with partners of Paine, Webber & Company, to discuss the matter with them, and Mr. Dodge went to see Mr. Brooks Leavitt about it.

On January 22, 1930, Mr. Brooks Leavitt wrote me asking me to see Mr. Randolph Hicks, one of the attorneys of the Realty Acceptance Corporation, and I did so.

(Sgd.) Robert E. Graham.

Sworn to before me this twenty-fourth day of April, 1930. (Sgd.) Grace Johnson, Notary Public. Notary Public, Queens County. County Clerk's No. 865, Register's No. 4863. Certificate filed in New York County. County Clerk's No. 39, Register's No. 1J25. Term expires March 30, 1931. (Seal.)

[fol. 38] In United States District Court

Supplemental Affidavit of Robert E. Graham on Behalf of Plaintiff—Filed April 30, 1930

State of New York,
County of New York, ss:

Robert E. Graham, being duly sworn, says:

I hereby certify that the attached exhibit is a true and correct copy of the agreement between Palmer & Company and Henry G. Montgomery, dated September 1, 1927.

(Sgd.) Robert E. Graham.

Sworn to before me this thirtieth day of April, 1930. (Sgd.) John R. Hawthorne, Notary Public. Notary Public, Queens County. County Clerk's No. 766, Reg. No. 783. New York Co. Clerk's No. 116, Reg. No. 2H50. Commission expires March 30, 1932.

Agreement—September 1, 1927, Palmer & Co. (the Firm) and H. G. Montgomery (M.)

1. Firm and M. form joint trading account, Firm contributing $75,000 and M. $25,000. Cash, or securities at market, deposited to protect trades shall not aggregate over $100,000, except when a Firm member and M. agree. M. is to manage the trading account. Any arbitraging business is to be conducted for the joint account, but each such transaction shall require the consent of a Firm member and M.

[fol. 39] 2. Joint account is to pay Firm full commissions on all Stock Exchange business and following expenses: increase, due to joint account, in basic telephone contract and local calls, but toll messages only on joint account business; increase, due to joint account, in stationery and postage; salaries of additional employees taken for joint account business, and other expenses incurred solely for joint account business. Office rent, general clerical and other general expenses and all additional equipment and furniture are not to be charged to joint account.

3. From net profits of joint account (both trading and arbitraging) remaining after deducting expenses under "2" $1,000 is to be paid M. monthly (accumulating when profits or reserve not available) and 25% of balance is to go into reserve account until unused reserve is $25,000, and the net profit then remaining is to be shared equally. Accounting and distribution at least quarterly. Securities long to be taken at market, securities short to be taken at cost or market whichever is higher, but at termination of agreement all securities, long or short, to be taken at market, except that fluctuations in securities contributed as capital are always for account of contributor.

4. Net losses on trading account to be divided 75% to the Firm and 25% to M, but M is in no case responsible beyond his capital contribution of $25,000 or unused balance.

5. This agreement is to be effective until October 1, 1930, or until M's death before then. If M unable to act for three months through illness Firm may terminate.
[fol. 40] Witness due execution by both parties.
(Signed) Palmer & Co. (Signed) H. G. Montgomery. (Sgd.) Robert E. Graham (for identification only).

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AFFIDAVIT OF L. BROOKS LEAVITT ON BEHALF OF DEFENDANT—Filed May 5, 1930

STATE OF NEW YORK,
County of New York, ss:

L. Brooks Leavitt, being duly sworn, deposes and says, as follows:

I am the L. Brooks Leavitt who has heretofore filed an affidavit in this action and I am a member of the firm of Paine, Webber & Company, stock brokers in New York City. I have known Mr. Marshall J. Dodge for many years and I have read his affidavit filed herein and the details of my conversations with him are as follows:

Sometime towards the latter part of December, he advised me over the telephone that he wished to see me and made an appointment to meet me at my office. Pursuant to said appointment, he came to my office and stated that he wished to discuss the advisability of exchanging stock of the General Bond and Share Corporation into the stock of the Industrial Finance Corporation and that he knew that my firm was familiar with the affairs of the General Bond and Share Corporation. I then gave him a general outline of the situation with reference to the General Bond and Share Corporation. The General Bond and [fol. 41] Share Corporation owns 97 per cent of the stock of Realty Acceptance Corporation, and, in outlining the general condition of the General Bond and Share Corporation, I necessarily mentioned the liability incurred by the Realty Acceptance Corporation as represented by the judgment in the United States District Court for Delaware, advising him that the case was on appeal. He told me that Mr. Montgomery had ceased to be a partner in his firm and that they had not at that time effected a settlement. I cannot recall the exact language used in my conversation with

Mr. Dodge, but am certain that he did not give me any details of his arrangement with Montgomery. I got the general impression that he was having some trouble with Montgomery.

Mr. Dodge asked me if I could get him a copy of the record and I told him that I thought I could procure a copy of the record for him and that I would take pleasure in sending it to him.

At that time, I thought that Mr. Dodge wished the record in connection with his controversy with Montgomery. Accordingly, when I returned to my office, I called up Mr. H. A. Frey, who is executive vice-president of the General Bond and Share Corporation and, as such executive head of Realty Acceptance Corporation a 97 per cent. owned subsidiary of the General Bond and Share Corporation, and asked him if he could get me a copy of the record. He said that he could get such a copy and that he would ask Mr. E. C. Huntington, Jr., who was the counsel of the company, to procure a copy for me. I asked him to have Mr. Huntington send the record to me at my office and on the twenty-sixth day of December, 1929, Mr. Huntington sent to my office a copy of the record accompanied by the letter dated December 26, 1929, a photostatic copy of which is at-[fol. 42] tached hereto as Exhibit 1. Upon receipt of this record, I transmitted same to Mr. Marshall J. Dodge. On the twenty-seventh day of December, 1929, this transcript of record was returned to me by Mr. Dodge accompanied by a letter, dated December 27, 1929, a photostatic copy of which is hereto attached as Exhibit 2. I was unable to communicate with Mr. Huntington on the twenty-eighth or twenty-ninth of December for some reason which I cannot at this moment recall and on December 30, 1929, Mr. Dodge called me over the telephone and asked me if I could again let him have the transcript of record in the case of Montgomery v. Realty Acceptance Corporation. I told him that I would be glad to send it back to him and on that date I again transmitted to Mr. Dodge the record, as shown by pencil memorandum made at the time on the letter which Mr. Dodge wrote me on December 27th. I heard nothing from Mr. Dodge until January 3, 1930, and on that date Mr. Dodge returned the papers to me, accompanied by a letter of that date, a photostatic copy of which is attached hereto as Exhibit 3.

On January 4, 1930, I wrote to Mr. Huntington, thanked him for having sent me the transcript of record and advised him that Mr. Dodge had suggested a discussion with Mr. Graham who could point out some inaccuracies in the testimony as far as Palmer & Company was concerned, a photostatic copy of my letter to Mr. Huntington is hereto attached as Exhibit 4. Mr. Huntington wrote me a letter in which he advised me that he had referred my letter of January 4th to Mr. Hicks. On January 7, 1930, I wrote to Mr. Marshall J. Dodge a letter in which I advised him that I had turned over to Messrs. Satterlee & Canfield his suggestion that Mr. Graham was willing to discuss the inaccuracies in the testimony as far as Palmer & Company was. [fol. 43] concerned. It is to be noted that I concluded that letter with this language:

"I am very glad if I have been able to be of any service to you in this connection,"

which sentence clearly shows that the papers in question were sought by Mr. Dodge for his benefit and not for mine and with no thought of benefitting me or the company in which I was interested.

On the twenty-first day of January, 1930, I met Mr. R. Randolph Hicks, a member of the firm of Satterlee & Canfield, trial counsel of that firm who had charge of the litigation of Montgomery v. Realty Acceptance Corporation and who told me that he would like to make an appointment with Mr. Graham for January 22, 1930, and on January 22, 1930, I wrote to Mr. Robert E. Graham a letter introducing Mr. Hicks, a photostatic copy of which is hereto attached as Exhibit 5, and never had any further connection with the matter until the filing of my affidavit herein on the second day of April, 1930, on the rereading of which it appears that I was mistaken as to the date of the request from Mr. Dodge. At the time of the making of the affidavit I made same entirely from memory and did not check the dates with my file, as I have done in the instant affidavit.

(Sgd.) L. Brooks Leavitt.

Sworn to before me this second day of May, 1930. (Sgd.) Barent Ten Eyck, Notary Public. Notary Public, New York County. N. Y. Co. Cl'k's No. 237, Reg. No. 1T6A. Kings Co. Cl'k's No. 53, Reg. No. 1202. Bronx Co. Cl'k's No. 33, Reg. No. 3175. Commission expires March 30, 1931. (Seal.)

[fol. 44] EXHIBIT 1

Satterlee and Canfield, Attorneys and Counsellors-at-Law, 49 Wall Street, New York

Herbert L. Satterlee, George F. Canfield, R. Randolph Hicks, Ellery C. Huntington, Jr., F. Morse Hubbard, T. C. P. Martin, James J. Irwin, Jr., David M. Milton.—Thomas F. Compton, Lauder W. Hodges, Lloyd F. Thanhouser, Crawford W. Hawkins, Evelyn P. Luquer, Arthur T. Sawyer, Richard V. Carpenter.

Cable Address: Satcan New York

(Time stamp.)

December 26th, 1929.

DEAR MR. LEAVITT: At Mr. Frey's request, I am sending herewith transcript of record together with deposition of Frederick H. Cone in the case of Henry G. Montgomery v. Realty Acceptance Corporation.

Will you be good enough to return these to us at your convenience?

Very truly yours, (Sgd.) E. C. Huntington, Jr.

ECH/H.

L. Brooks Leavitt, Esq., Paine Webber & Co., 25 Broad Street, New York, N. Y.

[fol. 45] EXHIBIT 2

Palmer and Company, Sixty-one Broadway, New York

Members of New York Stock Exchange

Telephone: Bowling Green 1420. Cable Address: "Merpal"

(In pencil:) Papers returned to Mr. Dodge as per his telephone request 12/30/29.

December 27th, 1929.

Mr. L. Brooks Leavitt, Paine Webber & Company, 25 Broad Street, New York City.

DEAR MR. LEAVITT: I am enclosing you the papers in the Montgomery-Realty Corporation suit which you so kindly

loaned me yesterday, together with the letter addressed to you by E. C. Huntington, Jr.

There are a number of inaccuracies in Mr. Montgomery's testimony insofar as his relations with Palmer & Company are concerned.

If it would be helpful, Mr. Graham would be glad at any time to see Mr. Huntington and tell him exactly what relationship existed, particularly prior to Mr. Montgomery's entrance into this firm, in connection with the joint account referred to in his testimony.

Very truly yours, (Sgd.) Marshall J. Dodge.

MD-LM.

2 encl.

[fol. 46] EXHIBIT 3

Palmer and Company, Sixty-one Broadway, New York

Members of New York Stock Exchange

Telephone: Bowling Green 1420. Cable Address: "Merpal"

January 3, 1930.

Mr. L. Brooks Leavitt, % Paine Webber & Co., 25 Broad Street, New York City.

MY DEAR LEAVITT: Thank you so much for again loaning us the papers in the Montgomery v. Realty Acceptance Corp. case.

Let me again remind you that at any time your attorneys wish to discuss the matter with our Mr. Graham, he will be only too glad to do so, and give you such real information as we have.

Very truly yours, (Sgd.) Marshall J. Dodge.

MJD.GJ.

[fol. 47] EXHIBIT 4

January 4, 1930.

Mr. Ellery C. Huntington, Jr., Messrs. Satterlee and Canfield, 49 Wall Street, New York, N. Y.

DEAR MR. HUNTINGTON: Thank you very much for sending me the transcript of record together with deposition of

Frederick H. Cone in the case of Henry G. Montgomery v. Realty Acceptance Corporation, which I return herewith.

Mr. Marshall J. Dodge, of Palmer and Company, has been good enough to suggest that if you should wish to discuss the matter with Mr. Graham, another partner of their firm, he could point out some inaccuracies in the testimony so far as Palmer and Company were concerned.

Very truly yours, —— ——.

LBL*AL.

Encs. 2

EXHIBIT 5

January 22, 1930.

Mr. Robert E. Graham, Messrs. Palmer & Company, 61 Broadway, New York, N. Y.

DEAR MR. GRAHAM: Mr. Marshall J. Dodge was good enough to suggest, after reading the testimony in the case of Montgomery v. Realty Acceptance Corporation, that you would be glad to discuss the matter with the attorneys for the Corporation.

[fol. 48] I have offered to introduce to you Mr. Hicks of the firm of Satterlee and Canfield, and to that end I am giving Mr. Hicks this letter.

We shall appreciate any assistance which you can render Mr. Hicks in this connection.

Very truly yours, —— ——.

LBL*AL.

EXHIBIT 6

January 7, 1930.

Mr. Marshall J. Dodge, Messrs. Palmer and Company, 61 Broadway, New York, N. Y.

DEAR MR. DODGE: I acknowledge receipt of your letter of January 3rd, returning the papers in the Henry G. Montgomery v. Realty Acceptance Corporation case.

I have passed on to the attorneys for the General Bond & Share Corporation—Messrs. Satterlee and Canfield—your suggestion that Mr. Graham would be willing to discuss inaccuracies in the testimony so far as Palmer and Company are concerned.

I appreciate very much this willingness to cooperate, if the occasion should arise.

I am very glad if I have been able to be of any service to you in this connection.

Very truly yours, —— ——.

LBL•AL.

———

[fol. 49] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF H. A. FREY ON BEHALF OF DEFENDANT—Filed May 5, 1930

STATE OF NEW YORK,
County of New York, ss:

H. A. Frey, being duly sworn, deposes and says:

I am the executive vice-president of the General Bond and Share Corporation, a corporation which owns approximately 97 per cent of the stock of the Realty Acceptance Corporation, and was such executive vice-president in December, 1929. Towards the latter part of December, 1929, Mr. L. Brooks Leavitt, a director of the General Bond and Share Corporation, requested me to furnish him with a copy of the transcript of record in the case of Montgomery v. Realty Acceptance Corporation. I told him that I would take up the matter with Mr. Huntington and have him send the record. Accordingly, I asked Mr. Huntington to see that the record was sent to Mr. Leavitt.

I had no further connection with the matter until the twenty-first day of January, 1930, on which date I arranged, through Mr. Leavitt, for an interview between Mr. Hicks and Mr. Graham.

(Sgd.) H. A. Frey.

Sworn to before me this second day of May, 1930. (Sgd.) C. G. C. Raphael, Notary Public. Notary Public, New York County. N. Y. Co. Cl'k's No. 24, Reg. No. 2R49. Commission expires March 30, 1932. (Seal.)

[fol. 50] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. C. HUNTINGTON, JR., ON BEHALF OF DEFENDANT—Filed May 5, 1930

STATE OF NEW YORK,
County of New York, ss:

E. C. Huntington, Jr., being duly sworn, deposes and says: I am an attorney at law and a member of the firm of Satterlee & Canfield and have for a number of years acted as general counsel for the General Bond and Share Corporation.

On December 26, 1929, Mr. H. A. Frey requested me to furnish a copy of the deposition of Frederick H. Cone and of the record in the case of Montgomery v. Realty Acceptance Corporation to Mr. L. Brooks Leavitt, and I, on that date, sent the said deposition, together with said record, to the office of Mr. Leavitt.

On January 4, 1930, this record and deposition was returned to me by Mr. Leavitt, as shown by his letter of that date, filed as a part of his affidavit. January 4th was a Saturday and on the following Monday morning I showed Mr. Leavitt's letter to my partner, Mr. Hicks, and asked him to give the matter his attention. Thereafter, I had no further connection with the matter, as Mr. Hicks had charge of this litigation.

(Sgd.) E. C. Huntington, Jr.

Sworn to before me this second day of May, 1930. (Sgd.) Robert W. Lewis, Jr., Notary Public. N. Y. Cl'k's No. 330; Register's No. 2L132. Commission expires March 30, 1932. (Seal.)

[fol. 51] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. RANDOLPH HICKS ON BEHALF OF DEFENDANT —Filed May 5, 1930

STATE OF NEW YORK,
County of New York, ss:

R. Randolph Hicks, being duly sworn, deposes and says: I have heretofore filed my affidavit herein. Some time early

in January, 1930, Mr. E. C. Huntington, Jr., my partner, turned over to me for attention a letter from Mr. L. Brooks Leavitt, which suggested an interview with Mr. Graham of the firm of Palmer & Company.

I was engaged in the Supreme Court of the City of New York on January 6, 7, and 8, with the trial of the case of Brush v. Aten. On the 9th of January I had a number of engagements which prevented me from giving the letter any attention and had to prepare for a trial on the 10th of January, 1930. On the 10th of January, 1930, I began in the Supreme Court of New York a trial of the case of Bulkley v. The Positype Corporation of America. This trial was concluded on January 15.

On January 16, 17, 18 and 19 my engagements were such as to render it impossible for me to make an appointment with Mr. Graham. On the 21st of January, however, through Mr. Leavitt, I made an appointment to meet Mr. Graham on the morning of the 22d of January, and pursuant thereto I did meet Mr. Graham on that morning, the details of which meeting are set forth in my affidavit already filed.

(Sgd.) R. Randolph Hicks.

[fol. 52] Sworn to before me this second day of May, 1930. (Sgd.) Lloyd F. Thanhouser, Notary Public. Notary Public, Queens County. Queens Co. Cl'k's No. 3617, Reg. No. 9072. N. Y. Co. Cl'k's No. 417, Reg. No. 1T300. Commission expires March 30, 1931. (Seal.)

IN UNITED STATES DISTRICT COURT

ORDER REQUESTING APPELLATE COURT TO REMAND CAUSE—
Filed June 23, 1930

And now, to-wit: this twenty-eighth day of June, 1930, 1930, the filing in this court of the petition of Realty Acceptance Corporation, defendant, praying this court to request the United States Circuit Court of Appeals for the Third Circuit to remand this cause and the record herein to this court, to the end that this court may vacate the

judgment entered in said cause and reopen said cause, for the purpose of taking and considering newly discovered evidence bearing solely on the quantum of the judgment, having been authorized by the United States Circuit Court of Appeals for the Third Circuit, and the said petition having been filed in this court and come on to be heard upon affidavits filed in support thereof, and in opposition thereto, and the same having been debated by counsel for the respective parties and maturely considered by the court,

It is ordered by the court that the United States Circuit Court of Appeals for the Third Circuit be and hereby is respectfully requested to dismiss the pending appeal taken by the defendant herein, without prejudice, and to remand [fol. 53] the cause and the record to this court, to the end that this court may vacate the judgment entered herein and, on application of the defendant, reopen the said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment.

(Sgd.) Hugh M. Morris. J.

[fol. 54] CERTIFIED COPY OF ORDER OF APPELLATE COURT REMANDING CAUSE—Filed June 30, 1930

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1929

No. 4216

REALTY ACCEPTANCE CORPORATION, Defendant-Appellant,

v.

HENRY G. MONTGOMERY, Plaintiff-Appellee

And now, to-wit: this twenty-eighth day of June, 1930, upon consideration of the order entered herein on June 23, 1930, by the District Court of the United States for the District of Delaware, requesting this Court to dismiss the appeal pending herein, without prejudice, and to remand this cause and the record herein to the said District Court to the end that the said District Court might vacate the judgment entered herein and on application of the defend-

ant-appellant re-open the said cause for the purpose of taking and considering certain newly discovered evidence, and

John E. Callahan of Philadelphia, Pennsylvania, an authorized representative of American Employers' Insurance Co., the surety upon the supersedeas bond filed herein by defendant-appellant, being present and stating that such surety company did not object to an order as requested by the said District Court, and

Thomas J. Crawford, Esq., of counsel for plaintiff-appellee, appearing in opposition thereto and stating that he has filed objections to this Court's order of March 25, 1930,

[fol. 55] It is ordered, adjudged and decreed that the appeal in the above-entitled cause be and the same is hereby dismissed, without prejudice, and that this cause and the record herein be and they are hereby remanded to the said District Court to the end that the said District Court may vacate the judgment entered herein and on application of defendant-appellant re-open the said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment.

Per Curiam:

Buffington, Circuit Judge.

Endorsements: 4216. Order Dismissing Appeal, etc. Received & Filed June 28, 1930. William P. Rowland, Clerk.

[fol. 56] Clerk's certificate to foregoing paper omitted in printing.

[fol. 57] . In United States District Court

Plaintiff's Exceptions to Order of June 23, 1930—Filed June 30, 1930

The plaintiff herein, hereby files the following exceptions to the order of this Court entered June 23, 1930, upon the petition of the Realty Acceptance Corporation, defendant:

1. Plaintiff respectfully excepts to said order upon the ground that, as the term of this Court at which the judgment herein was entered expired on the tenth day of June,

1929, this Court was without jurisdiction to entertain the motion for a new trial upon the petition of defendant Realty Acceptance Corporation, and that the order of this Court dated June 23, 1930, based on defendant's said petition, is therefore null, void and of no effect.

2. Plaintiff further respectfully excepts to said order upon the ground that, the order of the Circuit Court of Appeals for the Third Circuit, dated March 25, 1930, entered in that Court upon said defendant's petition in that Court, and pursuant to which this Court entertained the petition of said defendant for a new trial as to the quantum of damages upon which its order of June 23, 1930, is based, was null, void and of no effect, as it was made after the term at which the judgment of this Court herein was entered had expired and afforded this Court no jurisdiction or authority to entertain defendant's said petition or to grant the same.

3. Plaintiff further respectfully excepts to said order upon the ground that, the said order of the Circuit Court of Appeals for the Third Circuit, of March 25, 1930, did [fol. 58] not thereby remand this cause or the judgment herein to this Court, so as to vest this Court with any jurisdiction whatsoever in this cause, and that this Court was, therefore, without jurisdiction of the cause, and its action in considering said defendant's petition, and in making its order of June 23, 1930, based thereon, was without authority in law and was void and of no effect.

4. Plaintiff further respectfully excepts to the Court's holding in said order that, upon defendant's petition and supporting affidavits, and upon the affidavits filed by plaintiff in opposition thereto, the matters set forth in said petition were material to the issue of the quantum of the damages so as to warrant a rehearing herein upon said issue.

5. Plaintiff further respectfully excepts to the Court's holding in said order, that upon defendant's petition and supporting affidavits, and the affidavits filed by plaintiff in opposition thereto, that defendant had exercised due and reasonable diligence with respect to the presentation of the alleged new matter set forth in the said petition so as to

entitle it to a rehearing on the issue as to the quantum of the damages.

Dated June 27, 1930.

(Sgd.) Robert H. Richards, (Sgd.) Aaron Finger,
(Sgd.) Carl Ehlermann, Attorneys for Plaintiff.

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER VACATING JUDGMENT—Filed June 30, 1930

And now, to-wit, this thirtieth day of June, A. D. 1930, upon reading and considering a certified copy of an order entered on the twenty-eighth day of June, A. D. 1930, by the United States Circuit Court of Appeals for the Third Circuit, this day filed in this cause, dismissing without prejudice the appeal heretofore taken by the defendant herein, and remanding this cause and the record herein to this Court, it is, upon motion of Charles F. Curley, Esq., attorney for defendant, Aaron Finger, Esq., attorney for plaintiff, appearing in opposition hereto,

Ordered by the Court that the judgment entered herein be and hereby is vacated and set aside, and the said cause reopened for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment.

(Sgd.) Hugh M. Morris, J.

[fol. 60] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXCEPTIONS TO ORDER OF JUNE 30, 1930—Filed June 30, 1930

The plaintiff herein hereby objects to the entry of any order vacating the judgment in this cause, or to opening the same, or permitting the introduction of any new evidence, upon the following grounds, viz.:

(1) Because the term of this Court at which said judgment was rendered has expired and hence this Court is without jurisdiction to vacate or set aside the judgment or

to open the same or to hear any new evidence or to modify or in any respect alter the amount of said judgment.

(2) Because the Circuit Court of Appeals was without jurisdiction to remand said cause to this Court for the purpose of taking alleged newly discovered evidence bearing on the amount of the judgment by reason of the fact that the term of this Court at which said judgment herein was rendered had long since expired.

(3) Because this Court was without jurisdiction to make the order of June 23, 1930, entered herein, by reason of the fact that the term of this Court at which the judgment therein referred to was rendered had long since expired.

Dated June 30, 1930.

(Sgd.) Richards, Layton & Finger, (Sgd.) Carl Ehlermann, Attorneys for Plaintiff.

[fol. 61] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PETITION FOR APPEAL—Filed September 11, 1930

To the Honorable Judge of the District Court of the United States for the District of Delaware:

Henry G. Montgomery, plaintiff herein, feeling himself aggrieved by the order made and entered on the thirtieth day of June, 1930, purporting to vacate and set aside the judgment heretofore enfered herein on the first day of May, 1929, in favor of the plaintiff and against the defendant, in the sum of $80,500, and to reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment, does hereby appeal from said order to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays for an order allowing this petitioner to prosecute said appeal, and that a transcript of the record, papers and proceedings upon which said order was made may be duly authenticated and sent

to the United States Circuit Court of Appeals for the Third Circuit and that a citation be issued directed to the above-named defendant, Realty Acceptance Corporation, commanding it to appear before the United States Circuit Court of Appeals for the Third Circuit to do and receive what may appertain to justice to be done in the premises.

Henry G. Montgomery, by (Sgd.) Robt. H. Richards, (Sgd.) Aaron Finger, His Attorneys.

Dated Wilmington, Delaware, September 11, 1930.

[fol. 62] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed September 11, 1930

And now, to-wit, this eleventh day of September, A. D. 1930, upon reading and considering the foregoing petition for appeal, after hearing Aaron Finger, Esq., attorney for plaintiff-appellant, in support thereof, and Charles F. Curley, Esq., attorney for defendant-appellee, in opposition thereto, and without passing upon or considering the right of the plaintiff to the allowance of the appeal prayed.

It is ordered by the Court that the appeal prayed for in the said petition be and the same is hereby allowed, and the amount of bond to be entered by the plaintiff-appellant as security for costs on appeal is hereby fixed at the sum of two hundred and fifty dollars ($250).

(Sgd.) John P. Nields, J.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed September 11, 1930

Now comes Henry G. Montgomery, the plaintiff herein, by his attorneys, Robert H. Richards and Aaron Finger, and files the following assignment of errors and says that certain proceedings taken herein subsequent to the judgment in plaintiff's favor entered herein on May 1, 1929, and particularly the order entered on the thirtieth day of June, 1930, purporting to vacate and set aside the said

judgment heretofore entered herein in plaintiff's favor on the first day of May, 1929, are erroneous, invalid and of no effect for the following reasons:

[fol. 63] 1. That the March Term, 1929 of this Court, in which the said judgment of May 1, 1929 was entered, had expired long prior to the making and entry of the order of this Court dated June 30, 1930, and this Court was therefore without jurisdiction to make and enter its said order purporting to set aside said judgment of May 1, 1929, and reopen the said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment.

2. That the jurisdiction of this Court to consider defendant's motion for a new trial in the above-entitled cause, was co-termin-us with the term of the Court at which the judgment was entered, to-wit: the March Term 1929, which term expired under provisions of law, Section 75, U. S. Judicial Code, 28 U. S. C. A., Section 148, on the first Monday of June, 1929, and this Court was without jurisdiction after said date to make the order appealed from.

3. That the order of the Circuit Court of Appeals for the Third Circuit dated June 28, 1930, a certified copy of which order was filed in this Court, did not vest this Court with jurisdiction to make its said order of June 30, 1930, purporting to vacate and set aside the judgment as aforesaid, and did not in any way revive the term of this Court, or permit any further proceedings herein, other than the carrying out of the judgment of this Court entered May 1, 1929.

4. That as the March Term, 1929, at which the said judgment of May 1, 1929, was entered, had long since expired, this Court was without jurisdiction to make its order dated June 23, 1930, on defendant's motion, requesting the Circuit Court of Appeals to dismiss the appeal of the defendant Realty Acceptance Corporation, from the [fol. 64] judgment in plaintiff's favor against it, without prejudice, and to remand the cause to this Court to the end that this Court might vacate the said judgment of May 1, 1929, and, on application of the defendant, reopen

the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment, and said order was null, void and of no effect.

5. That the order of the Circuit Court of Appeals for the Third Circuit dated March 25, 1930, entered in that Court on defendant's motion, a certified copy of which order was filed in the District Court, did not vest this Court with any jurisdiction whatsoever in this cause, and this Court's action in considering defendant's motion, and in entering its order of June 23, 1930, was without authority in law and was void and of no effect.

6. That said order of this Court dated June 23, 1930, was null, void and of no effect, for the additional reason that at the time the defendant Realty Acceptance Corporation made its motion on which said order was entered, and at the time of the entry of said order, the cause had not been remanded to this Court, but remained in the Circuit Court of Appeals, and there was nothing before this Court in this cause, of which this Court could take jurisdiction.

Wherefore plaintiff prays that the said order of the District Court of the United States for the District of Delaware dated June 30, 1930, be reversed, vacated and for naught held and esteemed, and for such other relief as to which the plaintiff may be entitled.

(Sgd.) Robt. H. Richards, (Sgd.) Aaron Finger, Attorneys for Plaintiff.

Dated September 10, 1930.

[fol. 65] Citation, in usual form, showing service on Chas. F. Curley, filed September 24, 1930, omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 20, 1930

Please prepare and certify a transcript of the record and proceedings in the above-entitled cause, for filing in the United States Circuit Court of Appeals for the Third Cir-

cuit, at Philadelphia, Pennsylvania, on the appeal allowed the plaintiff in the above-entitled cause on the eleventh day of September, 1930, and include therein the following, viz:

1. Judgment in favor of plaintiff and against defendant, dated May 1, 1929, and entered May 11, 1929.

2. Docket entries subsequent to June 27, 1929 (the last docket entry included in the transcript of record on appeal of defendant).

3. Certified copy of order of United States Circuit Court of Appeals for the Third Circuit staying proceedings pending petition to the District Court, filed March 27, 1930.

4. Notice, petition of defendant, with affidavits of Charles F. Curley, L. Brooks Leavitt, and R. Randolph Hicks, filed April 10, 1930.

5. Affidavits of Henry G. Montgomery, Marshall J. Dodge, and Robert E. Graham, with exhibits annexed, filed April 28, 1930.

6. Affidavit of Robert E. Graham, with exhibit annexed, filed April 30, 1930.

7. Supplemental affidavits of L. Brooks Leavitt, H. A. Frey, E. C. Huntington, Jr., and R. Randolph Hicks, with exhibits annexed, filed May 5, 1930.

8. Order of District Court requesting Court of Appeals to remand cause, etc., filed June 23, 1930.

[fol. 67] 9. Certified copy of order of United States Circuit Court of Appeals, dismissing defendant's appeal and remanding cause, filed June 30, 1930.

10. Plaintiff's exceptions to order of June 23, 1930, filed June 30, 1930.

11. Order of District Court vacating judgment and reopening cause, etc., filed June 30, 1930.

12. Plaintiff's objections to entry of order of June 30, 1930, vacating judgment, etc., filed June 30, 1930.

13. Plaintiff's petition for appeal, order allowing appeal and assignments of error, filed September 11, 1930.

14. Citation.

15. Præcipe for transcript of record on appeal.

15-A. Transcript of record on appeal of defendant, to be treated as a physical exhibit and not part of the printed record on this appeal.

16. Clerk's certificate.

(Sgd.) Robt. H. Richards, (Sgd.) Aaron Finger,
Attorneys for Plaintiff-Appellant.

To H. C. Mahaffy, Jr., Clerk U. S. District Court, District of Delaware:

Service of the foregoing præcipe, with copy, accepted this twentieth day of October, A. D. 1930.

(Sgd.) Chas. F. Curley, Attorney for Defendant-Appellee.

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1930

No. 4506

NOTE OF HEARING AND RENDERING OF DECISION

And afterwards, to wit, the thirty-first day of March, 1931, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley, and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the sixth day of July, 1931, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 70] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1930

No. 4506

HENRY G. MONTGOMERY, Plaintiff-Appellant,

v.

REALTY ACCEPTANCE CORPORATION, Defendant-Appellee

On Appeal from the District Court of the United States for the District of Delaware

Before Buffington, Woolley, and Davis, Circuit Judges

OPINION OF COURT—Filed July 6, 1931

WOOLLEY, Circuit Judge:

In the cycle of happenings in this litigation, this appeal, oddly enough, brings here for review an error of our own.

As several errors have, necessarily or naturally, followed in the train of our original error, we shall state the case at length in our determination to straighten out the matter and end it once and for all.

Montgomery sued the Realty Acceptance Corporation for breach of a contract for hire running a term of years. A jury was waived and the case tried to the court. On the issue of damages the plaintiff proved his loss without testi- [fol. 71] -fying, in mitigation of damages, to money he had earned after his discharge, which, if earned, he was of course bound to state. In the District Court at its March Term 1929, he had judgment for $80,500. That judgment was final and no further action was taken with respect to it until after the term of the judgment when the defendant appealed to this court. In January 1930, we affirmed the judgment below and thereby disposed, adversely to the defendant, of all questions of law, with none of which are we presently concerned.

The defendant in due course filed a petition for rehearing which operated to stay the mandate. While that petition was pending the defendant by another petition asked leave of this court—the appellate tribunal then having jurisdiction of the case—to apply to the District Court to set aside the judgment and grant a new trial on the single issue of damages because of newly discovered evidence. This evidence as presented by the defendant's verified petition and not controverted by the plaintiff tended to prove that the plaintiff had since his discharge earned a substantial sum of money concerning which at the trial he did not testify in mitigation of damages and that the discovery was made under circumstances which, as to the defendant's diligence, brought it within the rule of after-discovered evidence.

At the argument on the petition for leave, the question whether the trial court, after the term of the judgment, had jurisdiction to open the judgment and re-try the case in whole or in part was not raised, nor, aside from the question of jurisdiction, was it shown that the case was one in which, after judgment, a new trial can be had on a single issue. The argument, as usual in such cases, revolved around the new evidence and its after discovery and in the heat of the argument on those restricted issues everyone, including ourselves, overlooked the patent fact that the

[fol. 72] petitioner was asking leave to move the trial court for a new trial after the term of the judgment, and for a new trial on a single issue without showing the case to be of the class in which such a restricted trial is permissible. Gasoline Products Co. v. Champlin Refining Company, 39 Fed. (2d) 521; 282 U. S. 824; U. S. .

We granted the defendant leave to ask the District Court at its option to open the judgment and admit and consider the newly discovered evidence solely on the quantum of damages, at the same time suspending the petition for rehearing and staying the mandate. In April 1930, the learned judge of the District Court feeling that, before he should act on the defendant's motion under our leave, the case should be wholly out of this appellate court and wholly back in his trial court, asked this court to remand the cause and the record for the purpose indicated. In compliance with this request a circuit judge, who had not sat in this case on appeal, signed a per curiam order in chambers remanding the case by dismissing the appeal. Then everything was back in the District Court where, on June 30, 1930—many terms after the term of the judgment—the judge vacated the judgment and granted a new trial on the single issue of damages. Then the plaintiff appealed from that order and for the first time in this court raised the question of the District Court's jurisdiction to open the judgment after the term; not having raised even yet the question whether the case is one in which a new trial may be had on one of several issues. Concurrently with this second appeal the plaintiff moved this court to vacate its per curiam order dismissing the first appeal and prayed that the mandate issue, forgetting for the moment that upon vacating that order the suspended petition for rehearing would automatically be re-instated and would remain to be decided.

[fol. 73] What is now before us? The order of the District Court opening the judgment by our leave and granting a re-trial on a single issue after the term of the judgment is the order now here on the plaintiff's appeal. The plaintiff's motion made in this court to vacate its per curiam order dismissing the first appeal is also here. Apprehending that the defendant would lose on both questions we denied its motion to force the plaintiff to an election.

What is the law? Except to correct inaccuracies in mere matters of form, it is firmly settled in federal practice that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless a proceeding for that purpose was begun during the term or the term was for that purpose extended under a general or special rule.

The authorities stating and acting upon this principle are too numerous to cite. Some of them may be found in Phillips v. Negley, 117 U. S. 665 and United States v. Mayer, 235 U. S. 55. These two decisions—the latter citing and approving the former—would have ruled the case at bar, on both the law and facts, against the District Court had it attempted to exercise jurisdiction by opening the judgment and allowing a retrial at a later term without our leave. And these cases we think rule the case at bar with equal force where the District Court did the same thing by our leave, unless by giving the District Court leave to open the judgment after the term we had power to restore to the District Court the jurisdiction which it had lost when the term of the judgment ended.

It should be noted that this is not the ordinary case of a new trial awarded after a judgment has been reversed. Here the judgment had been affirmed and with the affirmance still in force a new trial was ordered. Unless validated by our leave, the opening of the judgment and the [fol. 74] ordering of a new trial stand as though no leave had been asked or granted and fall directly within the Mayer case. As we find this court is without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term, the law of the Mayer case rules this case. It follows that in granting the defendant leave to ask the District Court to open the judgment after the term and award a new trial contrary to the rule which we knew perfectly well, we, quite inexcusably, committed error—the initial error—with two aspects: one, in authorizing the plaintiff to ask the District Court to do that which it could not lawfully do and the other, in authorizing the plaintiff to make a motion in the trial court for a new trial on one issue without first requiring it to show that the matter was of a kind triable on a single issue.

What followed? Two errors, necessarily or logically, followed the original error. One was the per curiam order of this court dismissing the appeal to give the trial court a free hand; the other was the action of the trial court in making the order opening the judgment and allowing a new trial on one issue.

Where does all this put the case? Should we sustain this court's per curiam order the appeal would stand dismissed for good and all and the mandate embodying the law of the case could never go down. If, without more, we annul this order, the appeal will be re-instated but the judgment first appealed from will remain set aside in the District Court and the mandate on the first appeal, should it go down, could give no effect to a judgment that is no longer in existence. If, without more, we reverse the order of the District Court vacating the judgment and awarding a new trial, the original judgment of the District Court would be re-instated but not affirmed because the appeal has been dismissed. Should we sustain both the order of the District [fol. 75] Court opening the judgment and the order of this court dismissing the first appeal we would thereby withhold our affirmance on the law and allow the District Court to go ahead and try the case on a single issue, that is, to do a doubtful thing as to re-trial on a single issue and do a futile thing as to re-trial after the term.

One more error in this case would not be pardonable. What, then, must be done?

We shall answer this question by working backwards and making directions as follows:

The order of the District Court opening the judgment and awarding a new trial on a single issue after the term at which the judgment was entered is on this second appeal reversed. That, on the issuance of the mandate, restores the judgment as entered. The order of the Circuit Court of Appeals dismissing the first appeal is vacated. That re-instates the first appeal in this court. It also automatically revives the suspended petition for rehearing. The petition for rehearing is now denied. That releases the order of affirmance in the first appeal and liberates the mandate. Then the mandate shall go down in due course under the rule. When that is done the judgment below will stand affirmed as entered.

These several orders however are made without prejudice to the defendant's right to seek relief by bill in equity.

A true Copy. Teste:
——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 76] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1931

No. 4506 (List No. 41)

HENRY G. MONTGOMERY, Appellant,

v.

REALTY ACCEPTANCE CORPORATION, Appellee

On Appeal from the District Court of the United States for the District of Delaware

ORDER REVERSING ORDER OF DISTRICT COURT—Filed July 6, 1931

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered on June 30, 1930, vacating the judgment in this cause, be, and the same is hereby reversed with costs.

Philadelphia, July 6, 1931.

(Sgd.) Victor B. Woolley, Circuit Judge.

[fol. a] **Appendix**

[NOTE.—Record in case No. 4216, October Term, 1929, annexed as an appendix to this record to avoid expense of reprinting and confusion in repaging.]

Summons—Covenant

PLAINTIFF'S DECLARATION—Filed April 15, 1927

UNITED STATES OF AMERICA,
District of Delaware, ss:

Realty Acceptance Corporation, the defendant above named, a corporation created by and existing under the laws of the State of Delaware, and a resident and a citizen of the State of Delaware, was summoned to answer Henry G. Montgomery, the plaintiff above named, a resident and a citizen of the State of New York, of a plea that the said defendant keep with the said plaintiff according to the force, form and effect of a certain agreement made between them, and thereupon the said plaintiff, by Robt. H. Richards, Esq., his attorney, avers that the matter or amount in controversy in this cause exceeds, exclusive of interest and [fol. 6] costs, the sum or value of three thousand dollars ($3000), and so averring complains:

(1) For that whereas heretofore, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware, by a certain agreement then and there made between the said defendant and the said plaintiff, one part of which said agreement, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid, after reciting as in the said agreement was and is recited, it was agreed by and between the said defendant and the said plaintiff that the said defendant, in consideration of the premises and of the mutual covenants thereinafter set forth in the said agreement and of one dollar ($1) and other good and valuable consideration paid and delivered by the said plaintiff to the said defendant at and before the execution and delivery thereof, the receipt whereof by the said defendant was thereby acknowledged, would employ the said plaintiff for a period from the date of the said agreement to and including December 31, 1929, as its president and as the president of any subsidiary corporation or corporations through which during said period it might conduct business in the State of New York and to pay the said plaintiff for his services as its president and as president of any such subsidiary corporation, or corporations, a salary from

October 1, 1924, to and including December 31, 1929, at the rate of twenty-five thousand dollars ($25,000) a year payable in equal monthly installments that all payments made during such period to the said plaintiff by The Stuyvesant Corporation pursuant to the provisions of a certain other agreement marked "Exhibit A" and annexed thereto and/or all payments made during said period to the said plaintiff as salary by any such subsidiary corporation or [fol. 7] corporations should discharge the said defendant pro tanto from the payment of salary to the said plaintiff thereunder; and that the said plaintiff would act as president of the said defendant and of any such subsidiary corporation or corporations for a period from the date of the said agreement to and including December 31, 1929, and during such period would devote his time and endeavors exclusively to the best interests of the said defendant, The Stuyvesant Corporation and any such subsidiary corporation or corporations, and would perform the duties of the president of the said defendant and of any such subsidiary corporation or corporations to the best of his ability, as by reference to the said agreement will amongst other things more fully and at large appear; and the said plaintiff in fact saith that forthwith, after the making of the said agreement, to wit, upon the said twenty-third day of September, A. D. 1924, to wit, at the District of Delaware aforesaid, he became and did act as president of the said defendant and of the said The Stuyvesant Corporation and of any such subsidiary corporation or corporations and did devote his time and endeavors exclusively to the best interests of the said defendant, the said The Stuyvesant Corporation and any such subsidiary corporation or corporations, and did perform the duties of the president of the said defendant and of any such subsidiary corporation or corporations to the best of his ability according to the true intent and meaning of the said agreement, and hath always in all things well and truly observed, performed, and fulfilled all things in the said agreement contained, on his part and behalf to be performed and fulfilled, to wit, at the District of Delaware aforesaid, nevertheless, the said plaintiff in fact saith that the said defendant heretofore, to wit, on the second day of December, A. D. 1926, to wit, at the District of Delaware aforesaid, wrongfully discharged the said plaintiff as its president and as the president of any such

[fol. 8] subsidiary corporation or corporations and did not thereafter pay to the said plaintiff for his services as its president or as the president of any such subsidiary corporation or corporations, a salary at the rate of twenty-five thousand dollars ($25,000) a year payable in equal monthly installments but on the contrary thereof the said defendant repudiated the said agreement and so the said plaintiff in fact saith that the said defendant hath not kept the said agreement so by it made as aforesaid but hath broken the same, and to keep the same with the plaintiff hath hitherto wholly neglected and refused and still doth neglect and refuse to the damage of the said plaintiff in the sum of two hundred and fifty thousand dollars ($250,000) and therefore he brings his suit.

(2) For that whereas also heretofore, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware, by a certain agreement then and there made between the said defendant and the said plaintiff, one part of which said agreement, sealed with the seal of the said defendant, the said plaintiff now brings here into Court the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, it was agreed by and between the said defendant according to the provisions and in the manner and effect following, that is to say:

"Agreement, dated September 23, 1924, between Realty Acceptance Corporation (a Delaware corporation), hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part

"Whereas, the Employee has heretofore entered into an agreement of employment in writing with The Stuyvesant Corporation (a New York investment company), a copy of which is annexed hereto, marked Exhibit 'A', and made a part of this Agreement; and

[fol. 9] "'Whereas, the Employer wishes to secure the services of the Employee as its President for a period from the date hereof to and including December 31, 1929;

"Now, therefore, this agreement witnesseth that in consideration of the premises and of the mutual covenants hereinafter set forth and of One Dollar ($1) and other good and valuable consideration paid and delivered by

the Employee to the Employer at and before the execution and delivery hereof, the receipt whereof by the Employer is hereby acknowledged, the parties hereto have agreed and by these presents do hereby agree as follows:

"First. The Employer agrees to employ the Employee as its President and as the President of any subsidiary corporation or corporations through which during said period it may conduct business in the State of New York, and to pay the Employee for his services as its President and as President of any such subsidiary corporation or corporations, a salary from October 1, 1924, to and including December 31, 1929, at the rate of Twenty Five Thousand Dollars ($25,000) a year, payable in equal monthly instalments. All payments made during such period to the Employee by The Stuyvesant Corporation pursuant to the provisions of the agreement marked Exhibit A and annexed hereto and/or all payments made during said period to the Employee as salary by any subsidiary corporation or corporations shall discharge the Employee pro tanto from the payment of salary to the Employee hereunder.

"Second. The Employee agrees to act as President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of Realty Acceptance Corporation, The Stuyvesant Corporation and any such subsidiary corporation or corporations, and to perform the duties of the [fol. 10] President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations to the best of his ability.

"In witness whereof, Realty Acceptance Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Secretary, and Henry G. Montgomery has hereunto subscribed his name and affixed his seal all as of the day and year first above written.

"Realty Acceptance Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)

"EXHIBIT 'A'

"This agreement, dated September 23, 1924, between the Stuyvesant Corporation (a New York investment company), hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part.

"Witnesseth, that in consideration of the mutual covenants hereinafter set forth the parties hereto have agreed and by these presents do hereby agree as follows:

"First. The Employer agrees to employ the Employee as its President for a period from the date hereof to and including December 31, 1929, and to pay to the Employee as compensation for his services as such President a salary from October 1, 1924, to and including December 31, 1929, at the rate of Twenty five Thousand Dollars ($25,000) a year, payable in equal monthly instalments.

"Second. The Employee agrees to act as President of the Stuyvesant Corporation for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively [fol. 11] to the best interests of the Stuyvesant Corporation and Realty Acceptance Corporation (a Delaware corporation) and any subsidiary corporation or corporations thereof, and to perform the duties of the President of the Stuyvesant Corporation to the best of his ability.

"In witness whereof the Stuyvesant Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Secretary, and Henry G. Montgomery has hereunto subscribed his name and affixed his seal all as of the day and year first above written.

"The Stuyvesant Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)"

and the said plaintiff in fact saith that forthwith after the making of the said agreement, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware aforesaid, he became, and acted as, President of the said defendant and of the said the Stuy-

vesant Corporation and of any such subsidiary corporation or corporations and did devote his time and endeavors exclusively to the best interests of the said defendant, the said the Stuyvesant Corporation and any such subsidiary corporation or corporations, and did perform the duties of the president of the said defendant and of any such subsidiary corporation or corporations to the best of his ability, and did continue so to act for a long space of time, to wit, from the said twenty-third day of September, A. D. 1924, until the second day of December, A. D. 1926, and hath always in all things well and truly performed, fulfilled and kept all things in the said agreement contained on the part of the said plaintiff to be performed and fulfilled, nevertheless, the said plaintiff in fact saith [fol. 12] that the said defendant heretofore, to wit, on the second day of December, A. D. 1926, to wit, at the District of Delaware aforesaid, wrongfully discharged the said plaintiff as its president and as the president of any such subsidiary corporation or corporations and did not thereafter pay to the said plaintiff for his services as its president or as the president of any such subsidiary corporation or corporations, a salary at the rate of twenty-five thousand dollars ($25,000) a year payable in equal monthly installments but on the contrary thereof the said defendant repudiated the said agreement and so the said plaintiff in fact saith that the said defendant hath not kept the said agreement so by it made as aforesaid but hath broken the same, and to keep the same with the plaintiff hath hitherto wholly neglected and refused and still doth neglect and refuse to the damage of the said plaintiff in the sum of two hundred and fifty thousand dollars ($250,000) and therefore he brings this suit.

(3) For that whereas also heretofore, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware, by a certain agreement then and there made between the said defendant and the said plaintiff one part of which said agreement sealed with the seal of the said defendant the said plaintiff now brings here into Court the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, it was agreed by and between the said defendant according

to the provisions and in the manner and effect following, that is to say:

"Agreement, dated September 23, 1924, between Realty Acceptance Corporation (a Delaware corporation), hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part

[fol. 13] "Whereas, the Employee has heretofore entered into an agreement of employment in writing with The Stuyvesant Corporation (a New York investment company), a copy of which is annexed hereto, marked Exhibit 'A', and made a part of this Agreement; and

"Whereas, the Employer wishes to secure the services of the Employee as its President for a period from the date hereof to and including December 31, 1929;

"Now, therefore, this agreement witnesseth that in consideration of the premises and of the mutual covenants hereinafter set forth and of One Dollar ($1) and other good and valuable consideration paid and delivered by the Employee to the Employer at and before the execution and delivery hereof, the receipt whereof by the Employer, is hereby acknowledged, the parties hereto have agreed and by these presents do hereby agree as follows:

"First. The Employer agrees to employ the Employee as its President and as the President of any subsidiary corporation or corporations through which during said period it may conduct business in the State of New York, and to pay the Employee for his services as its President and as President of any such subsidiary corporation or corporations, a salary from October 1, 1924, to and including December 31, 1929, at the rate of Twenty Five Thousand Dollars ($25,000) a year, payable in equal monthly instalments. All payments made during such period to the Employee by The Stuyvesant Corporation pursuant to the provisions of the agreement marked Exhibit A and annexed hereto and/or all payments made during said period to the Employee as salary by any such subsidiary corporation or corporations shall discharge the Employer pro tanto from the payment of salary to the Employee hereunder.

"Second. The Employee agrees to act as President of Realty Acceptance Corporation and of any such subsidiary

[fol. 14] corporation or corporations for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of Realty Acceptance Corporation, The Stuyvesant Corporation and any such subsidiary corporation or corporations, and to perform the duties of the President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations to the best of his ability.

"In witness whereof Realty Acceptance Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Secretary, and Henry G. Montgomery has hereunto subscribed his name and affixed his seal all as of the day and year first above written.

"Realty Acceptance Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)

"EXHIBIT 'A'"

"This agreement, dated September 23, 1924, between the Stuyvesant Corporation (a New York investment company), hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part,

"Witnesseth, that in consideration of the mutual covenants hereinafter set forth the parties hereto have agreed and by these presents do hereby agree as follows:

"First. The Employer agrees to employ the Employee as its President for a period from the date hereof to and including December 31, 1929, and to pay to the Employee as compensation for his services as such President a salary from October 1, 1924, to and including December 31, 1929, [fol. 15] at the rate of Twenty Five Thousand Dollars ($25,000) a year, payable in equal monthly instalments.

'Second. The Employee agrees to act as President of The Stuyvesant Corporation for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of The Stuyvesant Corporation and Realty

Acceptance Corporation (a Delaware corporation) and any subsidiary corporation or corporations thereof, and to perform the duties of the President of The Stuyvesant Corporation to the best of his ability.

"In witness whereof the Stuyvesant Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Secretary, and Henry G. Montgomery has hereunto subscribed his name and affixed his seal all as of the day and year first above written.

"The Stuyvesant Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)"

and the said plaintiff in fact saith that forthwith after the making of the said agreement, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware aforesaid, he became, and acted as, president of the said defendant and of the said The Stuyvesant Corporation and of any such subsidiary corporation or corporations and did devote his time and endeavors exclusively to the best interests of the said defendant, the said The Stuyvesant Corporation and any such subsidiary corporation or corporations and did perform the duties of the president of the said defendant and of any such subsidiary corporation or corporations to the best of his ability and hath always in [fol. 16] all things well and truly performed, fulfilled and kept all things in the said agreement contained on the part of the said plaintiff to be performed and fulfilled, and although the defendant well knew that at the time of the making of the said agreement the plaintiff had an enviable reputation as an organizer and executive or business manager and that one of the motives of the said plaintiff for entering into the said agreement was the enhancement of such reputation which would be derived from the performance of the said agreement, nevertheless, the said plaintiff in fact saith that the said defendant by its Board of Directors heretofore, to wit, on the twenty-second day of November, A. D. 1926, adopted the following resolution:

"Resolved that, it is the opinion of this Board that it is for the best interests of this Corporation and The Stuyvesant Corporation that all agreements between this Cor-

poration and/or The Stuyvesant Corporation and Henry G. Montgomery be forthwith terminated.

"Further Resolved that an offer be and it hereby is made to Mr. Montgomery, without prejudice, to arbitrate, pursuant to the provisions of the law of the State of New York, any and all rights, claims and obligations of a pecuniary nature arising from said agreements or any of them.

"Further Resolved that such offer shall expire by limitation, unless accepted by Mr. Montgomery by writing, addressed to Mr. E. P. Earle, on or before 3.00 o'clock P. M. on Wednesday, November 24, 1926.

"Further Resolved that the proper officers of this Corporation be and they hereby are authorized and directed, on behalf of this Corporation, to enter into such agreement or agreements of arbitration embodying the purposes of these resolutions, as may be approved by Messrs. Satterlee and Canfield.

[fol. 17] "Further resolved that a copy of these resolutions, certified by the Secretary of this Corporation, be delivered to Mr. Montgomery."

and the said plaintiff in fact further saith that thereafter, to wit, on the second day of December, A. D. 1926, the said defendant by its Board of Directors adopted the following resolution:

"Whereas a request has been made by the owner, or owners, of the majority of the stock of this Corporation for an immediate change in the management of the Corporation; and

"Whereas it is the opinion of this Board of Directors of Realty Acceptance Corporation that the management of the affairs of said Corporation under the direction of its present President, Henry G. Montgomery, has not been satisfactory; and

"Whereas an immediate change is deemed advisable;

"Now, therefore, it is

"Resolved that Henry G. Montgomery be and he hereby is removed from the office of President of Realty Acceptance Corporation, such removal to take effect immediately and said office of President of Realty Acceptance Corporation is hereby declared vacant.

"Resolved that the Secretary of Realty Acceptance Corporation be and he hereby is authorized and directed to

[fols. b-1] [Caption omitted]

In United States District Court, District of Delaware, March Term, 1927

No. 25

Henry G. Montgomery, Plaintiff,

v.

Realty Acceptance Corporation, Defendant

Docket Entries

Mar. 1, 1927.—Præcipe filed: same day summons issued, returnable 2d Tuesday in March, 1927.

Mar. 5, 1927.—Defendant appears by Charles E. Curley, Esqr., its attorney; same day præcipe filed.

Mar. 8, 1927.—Marshal returns on summons, "Served," &c; same day writ filed.

Apr. 15, 1927.—Declaration filed and rule pleas on or before 1st Monday in June, 1927. (Exit rule.)

Sept. 12, 1927.—Defendant's motion to strike portions of declaration filed.

Sept. 12, 1927.—Defendant's pleas filed and rule replications on or before September 22, 1927. (Exit rule.)

[fol. 2] Oct. 1, 1927.—Hearing on defendant's motion to strike.

Oct. 3, 1927.—Plaintiff's replication filed and rule rejoinder on or before October 13, 1927. (Exit rule.)

Oct. 25, 1927.—Opinion of court, filed.

Oct. 31, 1927.—Defendant's demurrer filed, and rule joinder on or before November 10, 1927. (Exit rule.)

Oct. 31, 1927.—Stipulation filed.

Dec. 13, 1927.—Order granting leave to plaintiff to file amendment to plaintiff's replications; same day amendment filed.

Apr. 7, 1928.—Stipulation that case be tried before the Court without a jury, filed.

May 11, 1928.—Motion of plaintiff, filed; same day order that defendant produce certain books and papers at trial, &c; same day order filed.

Dec. 18, 1928.—Trial to the court without a jury.

May 1, 1929.—Findings of Court and verdict, filed.

May 10, 1929.—Order granting defendant leave to file exceptions to court's charge; same day exceptions filed.

Judgment

May 11, 1929.—

And now, to wit, this first day of May, A. D. 1929, it is considered and adjudged by the court now here, that the said Henry G. Montgomery, plaintiff, do have and recover of and from the said Realty Acceptance Corporation, defendant, the sum of Eighty thousand five hundred dollars [fols. 3 & 4] ($80,500) and his costs in and about this suit expended, and have execution therefor.

Attest:

(Sgd.) H. C. Mahaffy, Jr., Clerk.

June 6, 1929.—Bill of exceptions signed and sealed by the court and filed.

June 6, 1929.—Petition of defendant for appeal, with assignments of error, filed; same day order allowing appeal, supersedeas bond in the sum of $90,000; same day order filed.

June 7, 1929.—Order approving bond of defendant in sum of $90,000, with American Employers' Insurance Company as surety; same day bond filed.

June 7, 1929.—Citation issued.

June 8, 1929.—Citation with acceptance of service by attorney for plaintiff-appellee endorsed thereon filed.

June 27, 1929.—Præcipe for transcript of record filed.

[fol. 5] In United States District Court, District of Delaware, March Term, A. D. 1927

No. 25.

Henry G. Montgomery, a Resident and a Citizen of the State of New York, Plaintiff,

v.

Realty Acceptance Corporation, a Corporation Created by and Existing under the Laws of the State of Delaware and a Resident and a Citizen of the State of Delaware, Defendant

ments made during said period to the said plaintiff as salary by any such subsidiary corporation or corporations should discharge the defendant pro tanto from the payment of salary to the said plaintiff thereunder; and that the said plaintiff would act as president of the said defendant and of any such subsidiary corporation or corporations for a period from the date of the said agreement to and including December 31, 1929, and during such period would devote his time and endeavors exclusively to the best interests of the said defendant, The Stuyvesant Corporation and any such subsidiary corporation or corporations and would perform the duties of the president of the said defendant and of any such subsidiary corporation or corporations to the best of his ability as by reference to the said agreement will amongst other things more fully and at large appear; and the said plaintiff in fact saith that by the said certain other agreement with the said The Stuyvesant Corporation it was agreed by and between the said plaintiff and the said The Stuyvesant Corporation that the said The Stuyvesant Corporation would employ the said plaintiff as its president for a period from the date thereof to and including December 31, 1929, and would pay the said plaintiff as compensation for his services as such president a salary from October 1, 1924, to and including December 31, 1929, at the rate of twenty-five thousand dollars ($25,000) a year payable in equal monthly installments and that the said plaintiff would act as president of the said The Stuyvesant Corporation for a period from the date thereof to and including December 31, 1929, and [fol. 21] would, during such period, devote his time and endeavors exclusively to the best interests of the said The Stuyvesant Corporation and the said defendant (a Delaware corporation) and any subsidiary corporation or corporations thereof and would perform the duties of the president of the said The Stuyvesant Corporation to the best of his ability as by reference to the said first mentioned agreement and its exhibit thereto attached and made a part thereof will amongst other things more fully and at large appear; and the said plaintiff in fact saith that forthwith after the making of the said agreement, to wit, upon the said twenty-third day of September, A. D. 1924, to wit, at the District of Delaware aforesaid, he became and did

act as president of the said defendant and of the said The Stuyvesant Corporation and of any subsidiary corporation or corporations and did devote his time and endeavors exclusively to the best interests of the said defendant, the said The Stuyvesant Corporation and any such subsidiary corporation or corporations and did perform the duties of president of the said defendant and of any subsidiary corporation or corporations to the best of his ability according to the true intent and meaning of the said agreement and hath always in all things well and truly observed, performed and fulfilled all things in the said agreement contained on his part and behalf to be performed and fulfilled, to wit, at the District of Delaware aforesaid; and the said plaintiff in fact further saith that the said defendant well knew that at the time of the making of the said agreement the plaintiff had an enviable reputation as an executive or business manager and that one of the motives of the said plaintiff for entering into the said agreement was the enhancement of such reputation which would be derived from the performance of the said agreement, nevertheless, the said plaintiff in fact saith that the said defendant hereto-[fol. 22] fore, to wit, on the second day of December, A. D. 1926, to wit, at the District of Delaware, aforesaid, wrongfully discharged the said plaintiff as its president and as the president of any such subsidiary corporation or corporations and thereafter refused to pay to the said plaintiff for his services as the president of the said defendant or as the president of any such subsidiary corporation or corporations a salary at the rate of twenty-five thousand dollars ($25,000) a year or at any other rate, but on the contrary thereof the said defendant repudiated the said agreement well knowing that the reputation of the said plaintiff as an executive or business manager would be greatly damaged thereby and that his injury would consist not only in his failure to receive the agreed compensation but also in not being allowed to perform the said agreement and to enhance his reputation and well knowing that by reason of the publicity given to such wrongful discharge the said plaintiff would find it difficult to obtain suitable and similar employment and so the said plaintiff in fact saith that the said defendant hath not kept the said agreement so by it made as aforesaid but hath broken the

same and to keep the same with the plaintiff hath hitherto wholly neglected and still doth neglect and refuse to the damage of the said plaintiff in the sum of two hundred and fifty thousand dollars ($250,000) and therefore he brings his suit.

(5) For that whereas also heretofore, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware, by a certain agreement then and there made between the said defendant and the said plaintiff, one part of which said agreement, sealed with the seal of the said defendant, the said plaintiff now brings here into Court the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, it was agreed by and between the said defendant according to the provisions and in the manner and effect following, that is to say:

[fol. 23] "Agreement, dated September 23, 1924, between Realty Acceptance Corporation (a Delaware corporation), hereinafter called the Employer, party of the first part and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part

"Whereas, the Employee has heretofore entered into an agreement of employment in writing with The Stuyvesant Corporation (a New York investment company), a copy of which is annexed hereto, marked Exhibit 'A', and made a part of this Agreement; and

"Whereas, the Employer wishes to secure the services of the Employee as its President for a period from the date hereof to and including December 31, 1929;

"Now, Therefore, This Agreement Witnesseth that in consideration of the premises and of the mutual covenants hereinafter set forth and of One Dollar ($1) and other good and valuable consideration paid and delivered by the Employee to the Employer at and before the execution and delivery hereof, the receipt whereof by the Employer is hereby acknowledged, the parties hereto have agreed and by these presents do hereby agree as follows:

"First. The Employer agrees to employ the Employee as its President and as the President of any subsidiary corporation or corporations through which during said period it may conduct business in the State of New York,

and to pay the Employee for his services as its President and as President of any such subsidiary corporation or corporations, a salary from October 1, 1924, to and including December 31, 1929, at the rate of Twenty Five Thousand Dollars ($25,000) a year, payable in equal monthly installments. All payments made during such period to the Employee by The Stuyvesant Corporation pursuant to the provisions of the agreement marked Exhibit A and annexed hereto and/or all payments made during said period to the Employee as salary by any such subsidiary corporation or [fol. 24] corporations shall discharge the Employer pro tanto from the payment of salary to the Employee hereunder.

"Second. The Employee agrees to act as President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of Realty Acceptance Corporation, The Stuyvesant Corporation and any such subsidiary corporation or corporations, and to perform the duties of the President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations to the best of his ability.

"In witness whereof Realty Acceptance Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Secretary, and Henry G. Montgomery has hereunto subscribed his name and affixed his seal all as of the day and year first above written.

"Realty Acceptance Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)

"EXHIBIT 'A' "

"This agreement, dated September 23, 1924, between The Stuyvesant Corporation (a New York investment company) hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part,

"Witnesseth, that in consideration of the mutual covenants hereinafter set forth the parties hereto have agreed and by these presents do hereby agree as follows:

"First. The Employer agrees to employ the Employee as its President for a period from the date hereof to and [fol. 25] including December 31, 1929, and to pay to the Employee as compensation for his services as such President a salary from October 1, 1924, to and including December 31, 1929, at the rate of Twenty five Thousand Dollars ($25,000) a year, payable in equal monthly instalments.

"Second. The Employee agrees to act as President of The Stuyvesant Corporation for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of The Stuyvesant Corporation and Realty Acceptance Corporation (a Delaware corporation) and any subsidiary corporation or corporations thereof, and to perform the duties of the President of The Stuyvesant Corporation to the best of his ability.

"In witness whereof The Stuyvesant Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Secretary, and Henry G. Montgomery has hereunto subscribed his name and affixed his seal all as of the day and year first above written.

"The Stuyvesant Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)"

and the said plaintiff in fact saith that forthwith after the making of the said agreement, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware aforesaid, he became, and acted as, President of the said defendant and of the said The Stuyvesant Corporation and of any such subsidiary corporation or corporations and did devote his time and endeavors exclusively to the best interests of the said defendant, the said The Stuyvesant Corporation and any such subsidiary corporation or corporations, and did perform the duties of the president of [fol. 26] the said defendant and of any such subsidiary

corporation or corporations to the best of his ability, and did continue so to act for a long space of time, to wit, from the said twenty-third day of September, A. D. 1924, until the second day of December, A. D. 1926, and hath always in all things well and truly performed, fulfilled and kept all things in the said agreement contained on the part of the said plaintiff to be performed and fulfilled, nevertheless, the said plaintiff in fact saith that the said defendant heretofore, to wit, on the second day of December, A. D. 1926, to wit, at the District of Delaware aforesaid, wrongfully discharged the said plaintiff as its president and as the president of any such subsidiary corporation or corporations and hath not paid the said plaintiff for his services as its president or as the president of any such subsidiary corporation or corporations a large sum of money due to the said plaintiff for his said services prior to the wrongful discharge of the said plaintiff, to wit, the sum of ten thousand dollars ($10,000) and hath not since the said wrongful discharge paid to the said plaintiff for his said services a salary at the rate of twenty-five thousand dollars ($25,000) a year or at any other rate but on the contrary thereof the said defendant to pay the said sums of money or any part thereof hath hitherto wholly neglected and refused and still doth neglect and refuse and so the said plaintiff in fact saith that the said defendant hath not kept the said agreement so by it made as aforesaid but hath broken the same and to keep the same with the said plaintiff hath hitherto wholly neglected and refused and still doth neglect and refuse to the damage of the said plaintiff in the sum of two hundred and fifty thousand dollars ($250,000) and therefore he brings his suit.

(Sgd.) Robt. H. Richards, Attorney for Plaintiff.

[fol. 27] Copy of Instrument of Writing upon Which Action is Brought

Agreement, dated September 23, 1924, between Realty Acceptance Corporation (a Delaware corporation), hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part

Whereas, the Employee has heretofore entered into an agreement of employment in writing with the Stuyvesant

Corporation (a New York investment company), a copy of which is annexed hereto, marked Exhibit "A", and made a part of this Agreement; and

Whereas, the Employer wishes to secure the services of the Employee as its President for a period from the date hereof to and including December 31, 1929;

Now, Therefore, This Agreement Witnesseth: That in consideration of the premises and of the mutual covenants hereinafter set forth and of One Dollar ($1) and other good and valuable consideration paid and delivered by the Employee to the Employer at and before the execution and delivery hereof, the receipt whereof by the Employer, is hereby acknowledged, the parties hereto have agreed and by these presents do hereby agree as follows:

First. The Employer agrees to employ the Employee as its President and as the President of any subsidiary corporation or corporations through which during said period it may conduct business in the State of New York, and to pay the Employee for his services as its President and as President of any such subsidiary corporation or corporations, a salary from October 1, 1924, to and including De- [fol. 28] cember 31, 1929, at the rate of Twenty-Five Thousand dollars ($25,000) a year, payable in equal monthly instalments. All payments made during such period to the Employee by the Stuyvesant Corporation pursuant to the provisions of the agreement marked Exhibit A and annexed hereto and/or all payments made during said period to the Employee as salary by any such subsidiary corporation or corporations shall discharge the Employer pro tanto from the payment of salary to the Employee hereunder.

Second. The Employee agrees to act as President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of Realty Acceptance Corporation, the Stuyvesant Corporation and any such subsidiary corporation or corporations, and to perform the duties of the President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations to the best of his ability.

In witness whereof Realty Acceptance Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Secretary, and Henry G. Montgomery has hereunto subscribed his name and affixed his seal all as of the day and year first above written.

Realty Acceptance Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)

[fol. 29] EXHIBIT "A"

This Agreement, dated September 23, 1924, between the Stuyvesant Corporation (a New York investment company), hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part,

Witnesseth, that in consideration of the mutual covenants hereinafter set forth the parties hereto have agreed and by these presents do hereby agree as follows:

First. The Employer agrees to employ the Employee as its President for a period from the date hereof to and including December 31, 1929, and to pay to the Employee as compensation for his services as such President a salary from October 1, 1924, to and including December 31, 1929, at the rate of Twenty-five Thousand Dollars ($25,000) a year, payable in equal monthly instalments.

Second. The Employee agrees to act as President of the Stuyvesant Corporation for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of the Stuyvesant Corporation and Realty Acceptance Corporation (a Delaware corporation) and any subsidiary corporation or corporations thereof, and to perform the duties of the President of the Stuyvesant Corporation to the best of his ability.

In witness whereof the Stuyvesant Corporation has caused these presents to be signed in its corporate name and its corporate seal to be hereunto affixed by its Sec-

retary, and Henry G. Montgomery has hereunto subscribed [fol. 30] his name and affixed his seal all as of the day and year first above written.

The Stuyvesant Corporation, by Murray R. Spies, Secretary. (Corporate Seal.) H. G. Montgomery. (L. S.)

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEAS—Filed September 12, 1927.

The defendant Realty Acceptance Corporation by Charles F. Curley, its attorney, comes and defends the wrong and injury when, etc., and as to the first, second and fifth counts in the said declaration contained says that the said plaintiff Henry G. Montgomery ought not to have or maintain his aforesaid action thereof against it because it says that under the laws of the State of Delaware, under which the said defendant was organized and exists, and under the by-laws of the defendant, prior to and at and since the date of the said alleged covenant relied on in the said counts, the office of defendant's president could be acquired or held in but one way, viz: Through the choice or election by its directors to hold office until his successor should be elected and qualified, and because under and in accordance with the said Delaware laws and the said by-laws, both existing throughout as aforesaid, the said plaintiff's successor as president of the defendant was elected and qualified on the second day of December 1926, and thereafter the said plaintiff did not act as defendant's president, and by reason of the said Delaware laws and the said by-laws was not entitled to act as such president notwithstanding anything in the said covenant contained; and further, because the said [fol. 31] plaintiff prior to the said ninth day of December, 1926, did not act as president of any other corporation referred to in the said covenant save the said the Stuyvesant Corporation which said corporation was organized and has existed under the laws of the State of New York, and that under such laws and the by-laws of the said corporation the said plaintiff was not the president of the said Stuyvesant Corporation nor entitled to act as such after

the ninth day of December, 1926; and further, because any agreement by defendant as a stockholder of the said Stuyvesant Corporation to employ the plaintiff as the president thereof without reference to the said corporation's interests was and is void and unenforceable against the defendant; and further because the defendant says that the best interests of the said Stuyvesant Corporation required a successor to the plaintiff as president thereof to be elected and qualified, as such successor was duly elected and qualified, on the ninth day of December, 1926; and further because any compensation owing to the said plaintiff for his said alleged service to this defendant and to the said Stuyvesant Corporation was fully paid until after the said ninth day of December, 1926. Without this, that the defendant wrongfully discharged the said plaintiff as its president and as the president of the said the Stuyvesant Corporation as alleged in the said counts, or that there was any agreement in the said alleged covenant set out legally binding the said defendant and broken by the said defendant as alleged in the said counts, or that prior to the institution of this action, the said plaintiff was entitled to demand from the said defendant the sums mentioned in the said counts or any part thereof; and this the defendant is ready to verify.

2. Actio non because it says that the alleged covenant set out in the said counts was and is void and not enforceable [fol. 32] against the said defendant because under the Delaware Laws under which the said defendant was organized and has existed it was and is provided that the president of the Delaware corporation should be chosen by either the stockholders or the directors of the corporation as its by-laws might direct, and that in making such choice the said stockholders or directors for the time being should use their best judgment for the said corporation's interests; and further because it was beyond the power of the defendant's directors and officers on September 23, 1924, the date of the said alleged covenant, by means of the said alleged covenant to legally undertake that during the said period of the said alleged covenant the defendant's stockholders or directors should not exercise their best judgment in choosing the defendant's president but on the contrary should employ the said plaintiff in said office during the said period

mail to Henry G. Montgomery at his last known address a duly certified copy of these resolutions."

and the said plaintiff in fact further saith that thereafter, to wit, on the ninth day of December, A. D. 1926, the said The Stuyvesant Corporation by its Board of Directors adopted the following resolution:

"Whereas request has been made by General Bond and Share Corporation, the owner and holder of majority [fol. 18] of the stock of Realty Acceptance Corporation which Corporation in turn owns and holds all of the stock of this Corporation for an immediate change in the management of this Corporation; and

"Whereas it is the opinion of this Board of Directors of The Stuyvesant Corporation that the management of affairs of said corporation under the direction of its present President, Henry G. Montgomery, has not been satisfactory;

"Now, therefore, it is

"Resolved that Henry G. Montgomery be and he hereby is removed from the office of President of The Stuyvesant Corporation, such removal to take effect immediately and said office of President of The Stuyvesant Corporation is hereby declared vacant.

"Resolved that the Secretary of The Stuyvesant Corporation be and he hereby is authorized and directed to deliver to Henry G. Montgomery at his last known address a duly certified copy of these resolutions."

and so the said plaintiff in fact saith that the said defendant, to wit, on the second day of December, A. D. 1926, to wit, at the District of Delaware aforesaid, wrongfully discharged the said plaintiff as its president and as the president of any such subsidiary corporation or corporations thus depriving the said plaintiff of his salary at the rate of twenty-five thousand dollars ($25,000) a year and greatly injuring the reputation of the said plaintiff as an executive or business manager and so the said plaintiff in fact saith that the said defendant hath not kept the said agreement so by it made as aforesaid but hath broken the same and to keep the same with the said plaintiff hath hitherto wholly neglected and refused and still doth neglect and refuse to

the damage of the said plaintiff in the sum of two hundred [fol. 19] and fifty thousand dollars and therefore he brings his suit.

(4) For that whereas also heretofore, to wit, on the twenty-third day of September, A. D. 1924, to wit, at the District of Delaware, by a certain agreement then and there made between the said defendant and the said plaintiff one part of which said agreement sealed with the seal of the said defendant the said plaintiff now brings here into court the date whereof is the same day and year aforesaid after reciting that the said plaintiff had theretofore entered into an agreement of employment in writing with The Stuyvesant Corporation (a New York investment company), a copy of which last mentioned agreement was annexed to said first mentioned agreement marked Exhibit "A" and made a part of the said first mentioned agreement and after reciting that the said defendant wished to secure the services of the said plaintiff as its president for a period from the date of said first mentioned agreement to and including December 31, 1929, it was agreed by and between the said defendant and the said plaintiff that the said defendant in consideration of the premises and of the mutual covenants thereinafter set forth in the said first mentioned agreement and of one dollar ($1) and other good and valuable consideration paid and delivered by the said plaintiff to the said defendant at and before the execution and delivery thereof the receipt whereof by the said defendant was thereby acknowledged would employ the said plaintiff for a period from the date of the said first mentioned agreement to and including December 31, 1929, as its president and as the president of any subsidiary corporation or corporations through which during said period it might conduct business in the State of New York and would pay the said plaintiff for his services as its president and as president of any such subsidiary corporation or corporations a salary from October 1, 1924, to and including De- [fol. 20] cember 31, 1929, at the rate of twenty-five thousand dollars ($25,000) a year payable in equal monthly installments that all payments made during such period to the said plaintiff by The Stuyvesant Corporation pursuant to the provisions of the said certain other agreement marked Exhibit "A" and annexed thereto and/or all pay-

[fol. 35] 4. Actio non because it says that the said defendant's certificate of incorporation, as that of a corporation organized and existing under Delaware laws; contained the following provision: "Any director or any officer elected or appointed by the stockholders or by the Board of Directors may be removed at any time in such manner as shall be provided in the by-laws of the corporation;" and further, because defendant's by-laws provided as follows: "Any director may be removed either with or without cause, at any time by the affirmative vote of a majority in interest of the stockholders of record of the corporation entitled to vote, given at a special meeting of the stockholders called for the purpose"; and further, because to the said plaintiff's knowledge such provision of the certificate of incorporation as well as the said by-law existed and were in force prior to and on and ever since the twenty-third day of September, 1924, the date of the said alleged covenant referred to in the said counts; and further because the laws of the State of Delaware in existence prior to and on and since September 23, 1924, provided that the president of a corporation should be chosen from among its directors; and further because at a special meeting of defendant's stockholders duly called for the purpose, and duly held on the thirty-first day of December, 1926, by the affirmative vote of the majority in interest of its stockholders entitled to vote, the said plaintiff was removed as a director of defendant, and his removal as president theretofore made by the board of directors, was approved; and further that thereupon the said plaintiff became legally disqualified to act or serve as defendant's president; and further that there was paid to plaintiff his salary as defendant's president according to the provisions of the said alleged covenant, to the said thirty-first day of December, 1926; and further because the said plaintiff prior to the thirty-first day of December, [fol. 36] 1926, did not act as president of any other corporation referred to in the said alleged covenant save the said The Stuyvesant Corporation, organized and existing under the laws of the State of New York; and further that the by-laws of the said corporation prior to and on, and since the said twenty-third day of September, 1924, provided that "Any director may be removed either with or without cause, at any time by the affirmative vote of a majority in interest of the stockholders of record of the corporation

entitled to vote, given at a special meeting of the stockholders called for the purpose''; and further that at a special meeting of the stockholders of the said corporation, held on the thirty-first day of December, 1926, duly called for the purpose and duly held, by the affirmative vote of a majority in interest of the said corporation's stockholders entitled to vote, the said plaintiff was removed as a director of the said corporation, and thereupon became legally disqualified to act or serve as the said corporation's president; and further that there was paid to plaintiff his salary as the said corporation's president according to the provisions of the said alleged covenant to the said thirty-first day of December, 1926. Without this, that the defendant at any time wrongfully discharged the said plaintiff as its president and as the president of the said The Stuyvesant Corporation, or that there was any agreement in the said alleged covenant set out legally binding the said defendant and broken by the said defendant as alleged in the said counts, or that prior to the institution of this action, the said plaintiff was entitled to demand from the said defendant the sums mentioned in the said counts or any part thereof; and this the defendant is ready to verify.

5. Actio non because the defendant says that for a long time prior to the second day of December, 1926, the said [fol. 37] plaintiff neglected and failed to devote his time and endeavors exclusively to the best interests of this defendant and of the said The Stuyvesant Corporation, and neglected and failed to perform the duties of the president of this defendant and of the said The Stuyvesant Corporation to the best of his ability and during the said period refused to obey the orders of the defendant and of the said The Stuyvesant Corporation concerning the business of the said corporations respectively; and further that the said The Stuyvesant Corporation was the only other corporation referred to in the said counts of which the said plaintiff acted as president prior to the ninth day of December, 1926; and because thereof this defendant on the second day of December, 1926, duly and rightfully removed the said plaintiff as its president, and the said The Stuyvesant Corporation, on the ninth day of December, 1926, duly and rightfully removed the said plaintiff as its president, and further that the compensation owing to the said plaintiff

for his services as president of this defendant and as president of the said The Stuyvesant Corporation according to the provisions of the said covenant, until after December 9, 1926, was fully paid. Without this, that the said plaintiff fully performed as president of the defendant and of the said The Stuyvesant Corporation prior to the second day of December 1926, in the case of this defendant, and prior to the ninth day of December, 1926, in the case of the said The Stuyvesant Corporation as by his said covenant he was bound to do, or that the said defendant broke its covenant as alleged in the said counts, or that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums in the said counts claimed or any part thereof, and this the defendant is ready to verify.

6. Actio non because the defendant says that on and prior to the twenty-third day of September, 1924, the said [fol. 38] plaintiff represented to the defendant that he had sufficient skill and ability and was competent to act as president of the defendant and as president of the said The Stuyvesant Corporation and to perform the services required of him in such office; and further the defendant says that in entering into the covenant set out in the said counts, it relied upon such representation; and further that the said plaintiff did not have sufficient skill and ability to act as its president and as president of the said The Stuyvesant Corporation and was not competent to perform the services required of him in such offices; and further because the said plaintiff prior to the thirty-first day of December, 1926, did not act as president of any other corporation referred to in the said alleged covenant save the said The Stuyvesant Corporation; and further that because of such lack of skill and ability and of such lack of competency the said plaintiff was on the second day of December, 1926, removed as president of this defendant, and on the ninth day of December, 1926, was removed as president of the said The Stuyvesant Corporation. Without this, that the said defendant broke its alleged covenant as stated in the said counts, or that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums in the said counts claimed or any part thereof, and this the defendant is ready to verify.

7. And for a further plea to the fifth count of the said plaintiff's declaration the defendant says that the said

plaintiff was not entitled on and after the second day of December, 1926, to act as its president, and on and after the ninth day of December, 1926, to act as the president of the said The Stuyvesant Corporation, because of the facts set out in the preceding counts, all of which are incorporated [fol. 39] herein, notwithstanding anything alleged in the said covenant set out in the said count; that the said The Stuyvesant Corporation was the only corporation referred to in the said count, other than the defendant, of which the said plaintiff acted as president; and further as to the plaintiff's claim in the said count for compensation for alleged services prior to the said alleged discharge of the said plaintiff as president of this defendant and as president of the said The Stuyvesant Corporation, this defendant says that on the twenty-third day of September, 1924, at a meeting of this defendant's directors, and prior to the election of the said plaintiff as defendant's president, a letter was presented and read to the meeting addressed by the said plaintiff to Mr. L. Brooks Leavitt who was then a director of defendant which letter was as follows:

"15 Dey Street, New York

"September 23, 1924.

"My Dear Mr. Leavitt: In connection with the business of Realty Acceptance Corporation, I feel that it is important that every reasonable effort be made to keep down the expenses of this corporation during its first year of business and with this in view I want to suggest that I am prepared to leave with the corporation $10,000 of my first year's salary until such time as the common stockholders shall have received a dividend.

"Very truly yours, H. G. Montgomery.

"Mr. L. Brooks Leavitt, 25 Broad Street, New York, N. Y."

And the defendant further says that the said plaintiff's then election as its president was on the basis of the proposition contained in his said letter; and this defendant fur- [fol. 40] ther says that its common stockholders have never received any dividend upon their stock in the defendant corporation.

Without this that there was any agreement in the said alleged covenant set out in the said count legally binding the said defendant and broken by the said defendant as alleged in the said count, or that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums mentioned in the said counts or any part thereof and this the defendant is ready to verify.

(Sgd.) Chas. F. Curley, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REPLICATIONS—Filed October 3, 1927

And the said plaintiff as to the first and second pleas of the said defendant by it above pleaded, sayeth that the said plaintiff, by reason of any of the things by the said defendant in those pleas alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he sayeth that the defendant did wrongfully discharge the said plaintiff as its president and as the president of the said The Stuyvesant Corporation, as alleged in the plaintiff's counts pleaded to by the said defendant, as aforesaid, and that the agreement and covenant set out and declared upon by the plaintiff was legally binding upon the said defendant and broken by the said defendant as alleged by the plaintiff in the said counts of his said declaration, and that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums mentioned in his said declara-
[fol. 41] tion; and this he, the said plaintiff, prays may be inquired of by the country.

And the said plaintiff, as to the third and fourth pleas by the said defendant above pleaded, sayeth that the said defendant ought not to be admitted or received to plead the said pleas by it thirdly and fourthly above pleaded because he says that the contract declared upon by the plaintiff in each and all of the counts of his declaration filed herein was entered into between the plaintiff and the defendant pursuant to the affirmative vote of all the directors of the said defendant and with the knowledge and approval of stockholders owning all or practically all of the capital

stock of the said defendant, and further because the said defendant corporation and the said The Stuyvesant Corporation had been organized and the various stockholders had invested in the stock of said defendant corporation upon the understanding that the plaintiff was to devote his time to the defendant corporation and said The Stuyvesant Corporation in the capacity of president under an agreement such as the one declared upon herein by the plaintiff, as aforesaid, and further because no objection to said agreement or to the performance by the plaintiff of his duties under said agreement was made by the defendant or by any stockholder or director of the defendant until a long time after said agreement was entered into between the plaintiff and the defendant, during all of which time the plaintiff continued to perform thereunder; and this he, the said plaintiff, is ready to verify; wherefore he prays judgment if the said defendant ought to be admitted or received to plead the pleas by him thirdly and fourthly above pleaded in this suit, etc.

And the said plaintiff, as to the fifth plea of the said defendant by it above pleaded, sayeth, precludi non, because he sayeth that the plaintiff did fully perform as president of the defendant and of the said The Stuyvesant Corpora- [fol. 42] tion prior to the second day of December, 1926, in the case of said defendant, and prior to the ninth day of December, 1926, in the case of the said The Stuyvesant Corporation, as by his said covenant he was bound to do, and that the said defendant did break its covenant as alleged in the counts pleaded to by said fifth plea, and that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums in the said counts claimed; and this he, the said plaintiff, prays may be inquired of by the country.

And the said plaintiff, as to the sixth plea of the said defendant by it above pleaded, sayeth, precludi non, because he sayeth that the defendant did break its covenant as stated in the counts pleaded to in the said sixth plea, and that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums in the said counts claimed; and this he, the said plaintiff, prays may be inquired of by the country.

And the said plaintiff, as to the seventh plea of the said defendant by it above pleaded, sayeth, precludi non, be-

cause he sayeth that the agreement in the covenant set out in the counts of the plaintiff's declaration pleaded to in the defendant's said seventh plea was legally binding upon the said defendant and was broken by the said defendant, as alleged in the said counts, and that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums mentioned in the said counts; and this he, the said plaintiff, prays may be inquired of by the country.

(Sgd.) Robt. H. Richards, Attorney for Plaintiff.

[fol. 43] In United States District Court

Stipulation as to Pleas—Filed October 31, 1927

It is hereby agreed between Robert H. Richards, Esquire, plaintiff's attorney and Charles F. Curley, Esquire, defendant's attorney, that the pleas already filed to the first, second and fifth counts of the declaration shall be considered as also filed to the third and fourth counts of the declaration with the same force and effect as though separate like pleas were physically filed to the said third and fourth counts.

(Sgd.) Robt. H. Richards, Attorney for Plaintiff.
(Sgd.) Chas. F. Curley, Attorney for Defendant.

October 21, 1927.

In United States District Court

Amendment to Plaintiff's Replications—Filed December 13, 1927

The plaintiff above named, leave of the Court first having been had and obtained, amends the replication heretofore filed by it in the above-stated case by striking out the replication to the third and fourth pleas filed by the defendant and substituting, in lieu thereof, the following replication to said third and fourth pleas, viz:

And the said plaintiff, as to the third and fourth pleas by the said defendant above pleaded, saith, precludi non,

because he saith that the defendant did wrongfully discharge the plaintiff as its president and as the president of the said The Stuyvesant Corporation, as alleged in the plaintiff's counts pleaded to by the said defendant, as aforesaid, and that the agreement and covenant set out and de-
[fol. 44] clared upon by the plaintiff was legally binding upon the said defendant and broken by the said defendant as alleged by the plaintiff in the said counts of his said declaration, and that prior to the institution of this action the said plaintiff was entitled to demand from the said defendant the sums mentioned in his said declaration; and this he, the said plaintiff, prays may be inquired of by the country.

(Sgd.) Robt. H. Richards, Attorney for Plaintiff.

In United States District Court

Stipulation Waiving Jury Trial—Filed April 7, 1928

It is hereby stipulated and agreed by and between Robert H. Richards, Esquire, attorney of record for the plaintiff, and Charles F. Curley, Esquire, attorney of record for the defendant, in the above-entitled cause, that the said cause shall be tried and determined by the Court without the intervention of a jury, and that a jury trial of said cause is hereby expressly waived.

(Sgd.) Robt. H. Richards, Attorney for Plaintiff.
(Sgd.) Chas. F. Curley, Attorney for Defendant.

Wilmington, Delaware, April 7, 1928.

[fol. 45 In United States District Court, District of Delaware, March Term, A. D. 1927

No. 25

Henry G. Montgomery, a Resident and Citizen of the State of New York, Plaintiff,

v.

Realty Acceptance Corporation, a Corporation Created by and Existing under the Laws of the State of Delaware and a Resident and a Citizen of the State of Delaware, Defendant

Bill of Exceptions—Filed June 6, 1929

CAPTION

Be it remembered, that the above-entitled cause came on for trial at a stated term of the District Court of the United States for the District of Delaware, on December 18, A. D. 1928, before the Honorable Hugh M. Morris, United States District Judge for the District of Delaware, presiding, and was tried by the Court without the intervention of a jury, pursuant to the stipulation filed in said cause.

Present: Robert H. Richards, Esq., Aaron Finger, Esq., Carl Ehlermann, Esq., C. D. Williams, Esq., Counsel for Plaintiff; Charles F. Curley, Esq., Randolph Hicks, L. W. Hodges, Esq., Counsel for Defendant.

[fol. 46] PLAINTIFF'S PROOFS

The plaintiff in the above-entitled cause, to maintain the issues on his part, offered the following evidence, to wit:

HENRY G. MONTGOMERY

HENRY G. MONTGOMERY was called as a witness on behalf of the plaintiff and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Finger:

Q. Mr. Montgomery, you are the plaintiff in this case?
A. Yes, sir.
Q. And you are a citizen and resident of the State of New York, are you not?
A. I am.
Q. The Realty Acceptance Corporation, a Delaware corporation, is the defendant?
A. Yes, sir.

Mr. Finger: I desire to offer in evidence the certificate of incorporation of the defendant corporation and of the Stuyvesant Corporation. I understand, Mr. Curley, that you have this available?

Mr. Curley: We have those.

The Court: What is the purpose, Mr. Finger? Is there a denial of the corporate existence of the Realty Acceptance Corporation by the defendant?

Mr. Finger: No; but the pleas had raised the question of ultra vires, and we offer the charter of the Realty Acceptance Corporation, as the only one I consider of im-
[fol. 47] portance in that connection. I also offer the charter of the Realty Acceptance Corporation.

The Court: All right.

(Received in evidence and marked "Plaintiff's Exhibit No. 1.")

Mr. Curley: You do not want the Stuyvesant? It ought to go in.

Mr. Finger: I do not think so—counsel seems to think it should go in.

The Court: The Stuyvesant—I do not see its purpose.

Mr. Finger: I do not either. Was that subsequent to the date of the contract?

Mr. Hodges: Yes.

Mr. Finger: We do not want that.

Q. Mr. Montgomery, did you have anything to do with causing the Realty Acceptance Corporation, the defendant, to go into existence?

A. Yes, I conceived the idea of the Realty Acceptance Corporation, and organized the group that put it together and raised the initial capital for it and then induced the bankers to supply the balance of the capital. I secured practically the entire advisory committee and most of the board of directors. It was a company that was unique in its character. It was one that had never been organized before, and I had made a study of it, and in organizing it, it was in a field by itself. There was nothing just like it.

Q. What is the general nature of the business of the corporation?

A. It was an acceptance company, organized to finance the purchasers of co-operative apartments.

[fol. 48] Q. Where?

A. In New York City or elsewhere.

Q. How did you come to conceive the idea of the company and cause it to come into existence?

without reference to the defendant's interests; and further that the said plaintiff did not act as defendant's president and was not entitled to act as such after the second day of December, 1926; and further the said defendant says that the said plaintiff prior to the ninth day of December, 1926, did not act as president of any other corporation referred to in the said alleged covenant save the said The Stuyvesant Corporation, which was organized and has existed under the laws of the State of New York, under which laws, the president of the said corporation must be chosen by its directors using their best judgment for the corporate interests; and that the interests of the said corporation required the election of a successor to the plaintiff as president thereof on the ninth day of December, 1926, and that the said alleged covenant in so far as it assumed to bind this defendant as a stockholder of the said corporation to employ or cause to be employed during the period of the said covenant, the said plaintiff as the president thereof [fol. 33] without respect to the said corporation's interests, was void and unenforceable against the defendant; and further that any compensation owing to the said plaintiff for services to this defendant and to the said Stuyvesant Corporation prior to December 9, 1926, was fully paid. Without this, that the defendant wrongfully discharged the said plaintiff as its president and as the president of the said The Stuyvesant Corporation as alleged in the said counts, or that there was any agreement in the said alleged covenant set out legally binding the said defendant and broken by the said defendant as alleged in the said counts, or that prior to the institution of this action, the said plaintiff was entitled to demand from the said defendant the sums mentioned in the said counts or any part thereof; and this the defendant is ready to verify.

3. Actio non because he says that the said defendant's Certificate of Incorporation, as that of a corporation organized and existing under Delaware laws, contained the following provision: "Any director or any officer elected or appointed by the stockholders or by the Board of Directors may be removed at any time in such manner as shall be provided in the by-laws of the corporation"; and further because the defendant's by-laws provided as follows: "Any officer may be removed either with or without cause

by a vote of a majority of the whole Board of Directors at a Special Meeting of the Board called for the purpose"; and further, because in the said plaintiff's knowledge the said provision of the certificate of incorporation as well as the said by-law existed and were in force prior to, and on, and ever since the twenty-third day of September, 1924, the date of the said alleged covenant referred to in the said counts; and further, because by the vote of the majority of the whole board of directors of the defendant, at a duly called and held special meeting of the said board of directors [fol. 34] called for the purpose and held on the second day of December, 1926, the said plaintiff was removed from the office of president of the said defendant, and after such date was not the defendant's president, and was not entitled to act as such notwithstanding anything in the said alleged covenant contained; and further, because the said plaintiff prior to the ninth day of December, 1926, did not act as president of any other corporation referred to in the said alleged covenant save the said The Stuyvesant Corporation, which was organized and has existed under the laws of the State of New York, which laws required that the president of a corporation be chosen by its directors using their best judgment for the corporate interests, and that the interests of the said corporation required the due election of a successor to the plaintiff as president thereof on the ninth day of December, 1926, and that the said alleged covenant in so far as it assumed to bind this defendant as a stockholder of the said corporation to employ the said plaintiff as the president thereof without respect to the said corporation's interests was void and unenforceable against the defendant; and further that any compensation owing to the said plaintiff for services to this defendant and to the said Stuyvesant Corporation prior to December 9, 1926, was fully paid. Without This, that the defendant wrongfully discharged the said plaintiff as its president and as the president of the said The Stuyvesant Corporation as alleged in the said counts, or that there was any agreement in the said alleged covenant set out legally binding the said defendant and broken by the said defendant as alleged in the said counts, or that prior to the institution of this action, the said plaintiff was entitled to demand from the said defendant the sums mentioned in the said counts or any part thereof; and this the defendant is ready to verify.

Mr. Curley: And the understanding is that they are without any necessity of formal proof; they are usable by either side.

The Court: All right.

[fol. 51] By Mr. Finger:

Q. Now, Mr. Montgomery, you then caused the Realty Acceptance Corporation to be organized, did you?

A. Yes, sir.

Q. And following the incorporation of the company, did you enter into a contract with that company?

A. I did.

Q. Was there another company called the Stuyvesant Corporation?

A. Yes, sir.

Q. And what was that corporation?

A. That was the operating company, held by the Realty Acceptance. It was organized under the banking laws and transacted the business of the two companies.

Q. The Banking Laws of what State?

A. State of New York.

Q. Who owned the stock of the Stuyvesant Corporation?

A. The Realty Acceptance owned all the stock of the Stuyvesant Corporation.

Q. Did you then enter into these two contracts with the Realty Acceptance Corporation and the Stuyvesant Corporation which I now hand you (handing papers)?

A. I did, yes.

Mr. Finger: We offer them in evidence.

Mr. Curley: I object to their going into evidence until the legal proof necessary for the authorization and the execution of those contracts is offered too.

Mr. Finger: We are going to offer that.

Mr. Curley: Assuming that counsel accompanies or follows this offer with the minutes of the meeting of the directors which authorized this resolution, then of course I have no objection.

[fol. 52] Mr. Finger: We will follow that with offering this resolution.

(The contract with the Realty Acceptance Corporation and the plaintiff, was received in evidence and marked "Plaintiff's Exhibit No. 2.")

(The contract with the Stuyvesant Corporation and the plaintiff was received in evidence and marked "Plaintiff's Exhibit No. 3.")

Q. Mr. Montgomery, did you seek the office of president of either of these corporations?

Mr. Curley: May it please the Court, is that material?

The Court: I do not see it is.

Mr. Finger: It is material only on the issue of these $10,000. In other words, as to the circumstances——

The Court: What is there anywhere about the $10,000 in writing?

Mr. Finger: There is the plea.

The Court: I remember the plea, but what is there in the way of evidence that is written or documentary, with respect to that $10,000?

Mr. Finger: Copy of the *lat*-er as embodied in the resolution, authorizing this contract; and what I want to show as a matter of fact is that the letter did not induce the contract, but follows it.

The Court: I am wondering whether that would be pertinent or material in any event—I think it would not, and I have not seen the letter, and I know nothing except what you tell me; but I am wondering whether the defendant could remove the plaintiff from the office of president and then deprive him of the opportunity to make the suggestion about which the letter relates, and at the same time hold [fol. 53] the $10,000. The impression I gather without deciding it, is that the incident of removal makes the $10,000 immediately payable—but I do not know that until I know more about the case. I am only saying this, as I am endeavoring to justify my ruling.

Q. Mr. Montgomery, were you present at the meeting of the directors of the Realty Acceptance Corporation at the time of the execution of your contract and when it was authorized?

A. I was.

Q. Do you remember the date of that meeting?

A. Not precisely.

Q. Was it September 23, 1924?

A. That was about the time.

Mr. Finger: I now offer in evidence the extract from the minutes of that meeting in lieu of the minute book, which is a matter of convenience.

Mr. Curley: May it please the Court, I object to this proffer. The minutes are here and available to counsel. Without the necessity of any formal proof of such minutes, counsel has taken apparently certain excerpts from these minutes, criticizable in the first instance, because they are removed from their context. For instance, the excerpt that he now offers from these minutes, refers to a form of contract, the execution of which this meeting authorized; and yet the form of contract submitted to the meeting, the execution of which is being authorized by the meeting, nowhere appears in the excerpt.

Mr. Finger: Is it any different?

Mr. Curley: I see no reason, with the minutes available, as there is no jury sitting here, your Honor is passing on [fol. 54] law and fact, and we want all the surroundings of this case to be before your Honor. Why does not counsel offer in evidence the minutes of the meeting, if he relies on these minutes for the authority of the execution of his contract? That is the best evidence of what has been done.

The Court: My recollection is that the authorities hold that the minutes are not necessarily the best evidence, but they are evidence of what is done, but——

Mr. Curley: I do not think there is any question raised now or imminent as to whether the minutes correctly narrate the occurrences of the meeting. I understand with your Honor that the minutes are not the exclusive evidence, that somebody can show something occurred contrary to what the minutes show.

The Court: What, show it independently of the minutes?

Mr. Curley: But counsel is now showing the minutes of one form of proof of what occurred at the meeting and counsel is now offering certain excerpts from these minutes, which, by itself, and removed from these minutes, may well be meaningless.

The Court: What do you say, Judge Finger?

Mr. Finger: May it please the Court, that statement that the excerpt offered may be something different from its context disturbs me, and I would like to have counsel point that out. So far as anything is indicated to exist, it is the fact I have not incorporated in this memorandum a copy of

the contract. So far as I know, I have not made a comparison to find if the copy in the minutes is precisely the [fol. 55] same as the original contract in evidence, and I saw no need of copying the whole contract.

Mr. Curley: There is no reason why counsel should be disturbed by anything I say; I referred to the physical fact that what the counsel was offering was an excerpt of the minutes of the meeting instead of the minutes themselves; that is palpably what you are doing.

The Court: You may establish in such way as you deem proper the actions that were taken at that meeting, Mr. Finger, and if the defense then finds that there are other actions, then taken, they can be introduced by the defendant.

Mr. Curley: The Court overrules the objection to this excerpt from the minutes?

The Court: Unless this is admitted to be an excerpt from the minutes, unless it is proved to be, as a matter of fact, a correct statement of the transactions there occurring, I do not admit it as an excerpt of the minutes. The witness testifies that the things here—if he uses this to refresh his recollection, he may do it independently of the minutes; but I am not admitting them as excerpts from the minutes at all. If there is an offer in evidence, and there is an objection to that, that objection is sustained.

Mr. Finger: Yes, sir.

Mr. Curley: I made that objection.

Mr. Finger: Then I call for the minute book. (Book handed.)

The Court: What I was trying to say was that this witness should testify as to any event or events or acts or [fol. 56] act that transpired at that meeting, independently of the minutes, if his memory would enable him to do so.

Mr. Curley: I understood. If I may suggest that the minutes regularly kept were primary evidence and the best evidence of what occurred at the meeting, that they do not bind anybody to contradict them, but that an individual would not be allowed in the first instance, without any evidence of minutes at all before the Court, to assume to testify as to what occurred at the meeting when the minutes were available.

The Court: I think there are some authorities to the contrary, and I am not clear as to whether they prevail. My

thought is to the contrary, that they state the weight of the authority, and if Judge Finger will offer the minutes——

Mr. Finger: I desire to offer in evidence the minutes of September 23, 1924, of the special meeting of the board of directors of the defendant corporation.

Mr. Curley: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 4.")

Mr. Finger: For the information of your Honor, I desire to read from these minutes.

The Court: All right.

Mr. Finger (reading): "Mr. Leavitt having been recognized by the chair, submitted to the meting a proposed form of agreement proposed to be entered into between this corporation and Mr. Montgomery pursuant to the terms of which Mr. Montgomery was to act as President of the corporation for a period of five years——"

[fol. 57] Mr. Curley: One moment, Mr. Finger. I do not know whether counsel is reading from the minutes which were offered in evidence or from the excerpts which were previously offered and refused admission.

The Court: You may follow that reading, if you want.

Mr. Curley: I have not any question whatever that counsel is reading correctly. I only want to get clear, as counsel is now reading to the Court, to put into the record a portion of the minutes, which are not in evidence, that it is a portion only; is that right?

Mr. Finger: I am reading from these minutes (indicating).

The Court: Such portions as you deem pertinent?

Mr. Finger: Yes, sir.

Mr. Curley: That is all.

Mr. Finger: Copy of such agreement is as follows. I won't read the agreement.

"Resolved, that the form, terms and provisions of the form of Agreement submitted to this meeting, prepared to be executed by Mr. Montgomery and by this Corporation be, and they hereby are, in all respects approved;

"Resolved, that the Secretary of this Corporation, be, and here hereby is, authorized and directed to execute in duplicate in the name and on behalf of this Corporation

and under its corporate seal, an Agreement in substantially the form of the form of Agreement submitted to this meeting and to deliver such Agrement in duplicate to Mr. Montgomery;

[fol. 58] "Resolved, that upon receipt of one of the duplicates of said Agreement duly executed by Mr. Montgomery, the proper officers of this Corporation be, and they hereby are, authorized and directed to do or cause to be done all such acts and things including the disbursement of necessary funds of this Corporation as may be necessary or proper in order that this Corporation may fully perform, carry out and discharge its every obligation under the Agreement then so entered into by it.

"Mr. Leavitt then presented and read to the meeting a letter, dated September 23, addressed to him by Mr. Montgomery.

"Thereupon, on motion duly made by Mr. Cross, and seconded by Mr. Montgomery, the following resolution was unanimously adopted:

"Resolved, that a copy of the letter, dated September 23, 1924, addressed by Mr. H. G. Montgomery to Mr. L. Brooks Leavitt be incorporated in the minutes of this meeting.

"A copy of such letter is as follows:

"11 Dey Street, New York

"September 23, 1924."

My Dear Mr. Leavitt: In connection with the business of Realty Acceptance Corporation, I feel that it is important that every reasonable effort be made to keep down the expenses of this corporation during its first year of business and with this in view I want to suggest that I am prepared to leave with the corporation $10,000 of my first year's salary until such time as the common stockholders shall have received a dividend.

"Very truly yours, H. G. Montgomery."

Mr. Curley: (Off the record.)

[fol. 59] The Court: The accuracy of the excerpt read by counsel for the plaintiff having been in question, and it

appearing that the copy made by the clerk for plaintiff's counsel not having been compared by counsel, I think it proper that its accuracy should now be determined from the original minutes.

Mr. Finger: I admit that the minutes as shown in this minute book do not contain that notation, "Mr. Montgomery not voting."

Mr. Curley: That the minutes shown in the minute book in evidence do not show any notation of Mr. Montgomery not voting.

Mr. Finger: Yes.

The Court: If your stenographer is not accurate, you had better read from his minutes.

Mr. Finger: I have no doubt that the inaccuracy arose from the fact that the paper from which it was copied, did not contain it. Withdrawing the reading previously, I now read direct from the minute book itself:

"Mr. Leavitt having been recognized"——

Mr. Curley: May I suggest for the Court's benefit and my benefit, would it be any trouble to read the page from which you are reading, so that they can more easily find it?

Mr. Finger: At the bottom of page 5 of the minutes of the Directors' Meeting of September 23, 1924.

"Mr. Leavitt having been recognized by the chair, submitted to the meeting a proposed form of Agreement prepared to be entered into between this Corporation and Mr. [fol. 60] Montgomery pursuant to the terms of which Mr. Montgomery was to act as President of this Corporation for a period of five (5) years at an annual compensation therein specified."

"Mr. Leavitt then stated that this Corporation and its New York subsidiary had been organized and the various stockholders had invested in the Corporation upon the understanding that Mr. Montgomery was to devote his time to these corporations in the capacity of President and that he understood that the terms expressed in the proposed Agreement were satisfactory to Mr. Montgomery.

"After consideration of the terms and provisions of the proposed Agreement submitted by Mr. Leavitt, the following resolutions were, on motion duly made and seconded, adopted:

"Resolved, that the form, terms and provisions of the form of Agreement submitted to this meeting, prepared to be executed by Mr. Montgomery and by this Corporation be, and they hereby are, in all respects approved;

"Resolved, that the Secretary of this Corporation, be, and he hereby is, authorized and directed to execute in duplicate in the name and on behalf of this Corporation and under its corporate seal, an Agreement in substantially the form of the form of Agreement submitted to this meeting and to deliver such Agreement in duplicate to Mr. Montgomery.

"Resolved, that upon receipt of one of the duplicates of said Agreement duly executed by Mr. Montgomery, the proper officers of this Corporation be, and they hereby are, authorized and directed to do or cause to be done all such acts and things including the disbursement of necessary funds of this Corporation as may be necessary or [fol. 61] proper in order that this Corporation may fully perform, carry out and discharge its every obligation under the Agreement then so entered into by it.

"Mr. Leavitt then presented and read to the *the* meeting a letter, dated September 23, addressed to him by Mr. Montgomery.

"Thereupon, on motion duly made by Mr. Cross, and seconded by Mr. Montgomery, the following resolution was unanimously adopted:

"Resolved, that a copy of the letter, dated September 23, 1924, addressed by Mr. H. G. Montgomery to Mr. L. Brooks Leavitt be incorporated in the minutes of this meeting:

"A copy of such letter is as follows:

"11 Dey Street, New York

September 23, 1924.

"My Dear Mr. Leavitt: In connection with the business of Realty Acceptance Corporation, I feel that it is important that every reasonable effort be made to keep down the expenses of this corporation during its first year of business and with this in view I want to suggest that I am prepared to leave with the corporation $10,000 of my

first year's salary until such time as the common stockholders shall have received a dividend.

"Very truly yours, H. G. Montgomery."

Mr. Finger: Mr. Ehlermann calls my attention to the fact that the minutes from which I read which contain the words, "Mr. Montgomery not voting," were, in fact, from the Stuyvesant minutes of the same day, and I observe that the memorandum from which I was reading was, in fact, from the Stuyvesant minutes—that is where the error occurred.

[fol. 62] By Mr. Finger:

Q. Mr. Montgomery, calling your attention to the letter from you to Mr. Leavitt, dated September 23, 1924, will you state to the Court the circumstances under which that letter was given to Mr. Leavitt, and presented to the meeting?

A. The original arrangement that I had discussed with Mr. Leavitt was a salary of $25,000 a year for five years. I felt that was a rather heavy toll for so small a company to pay, and yet I was unwilling to divorce myself from those associations at that time, unless such salary was paid. Later, and only a day or two before the incorporation of the meeting, I concluded that I would give up—I would be willing to give up $10,000 of my first year's salary, unless dividends were paid from the common stock, and what I did was done entirely upon my own initiative. I brought it to Mr. Leavitt's attention at the beginning of this meeting, and he did not seem to think that it was a thing that I ought to do.

Mr. Curley: I object to the witness's statement of what Mr. Leavitt thought or did not think.

The Court: Objection sustained.

Q. Now, Mr. Montgomery, who was Mr. Leavitt?

A. I did not hear you.

Q. Now, Mr. Montgomery, who was Mr. Leavitt?

A. Mr. Leavitt was a partner in the firm of Paine, Webber & Co., that bought the balance of the stock that I had not sold.

Q. Was there any understanding between you and Mr. Leavitt pertaining to your becoming president of this corporation, as a basis for the purchase by Paine, Webber & Company for this balance of stock?

Mr. Curley: I object. It is wholly immaterial what understanding this witness may have had with Mr. Leavitt. [fol. 63] He is here speaking of a contractual relation with the defendant, the Realty Acceptance Corporation.

The Court: I think the objection is well taken.

Q. Mr. Montgomery, at the time the directors voted for the adoption of the resolution authorizing the agreement with you, what directors, if any, knew of the existence of this letter which you have written?

Mr. Curley: May it please the Court, I object to that. The minutes which are in evidence, offered by the counsel for the other side, show that this letter was read at the meeting of the directors, so, on the basis of the minutes, all directors heard it.

The Court: Before or after the adoption of the resolution, I have not yet gotten that.

Mr. Finger: After.

Mr. Curley: After the adoption of the resolution, but prior to the execution of any contract authorized by the resolution, and prior to this witness' election by those directors who were present; that is, in sequence of time as shown by the minutes, this letter from the witness to Mr. Leavitt as to the holding back of the $10,000 of salary until such time as the dividend should be paid on the common stock was read to the meeting, after that appointed time in the minutes by subsequent resolution, the directors elected this witness as president of the corporation.

The Court: What was the first resolution?

Mr. Finger: Authorizing the execution of the contract.

Mr. Curley: Authorizing the execution of the contract.

[fol. 64] Mr. Finger: Of course, the minutes do not show that the signatures physically were affixed to the contract.

The Court: I am not concerned with that, but as authorizing the execution of a contract, and that contract which has not been read but you have told me about, provides for his employment in a certain capacity, to wit, president, at a salary for five years.

A. I was an executive of the New York Telephone Company, and I was approached by a real estate dealer who wanted to sell me a co-operative apartment. He told me the price of the apartment was $50,000, and I asked him how much I would be able to borrow on it, and how much I would have to pay in cash, and how much I could borrow. He said—you could not borrow anything on it. He said—you would have to pay it all in cash. I asked him why the collateral or security that he was offering me was less attractive than an automobile or any of the other securities or property that was being sold through the finance companies. He said he did not know. It was not possible to handle it in that way. I told him I thought it was, and I would like to meet this principal and discuss it with him. He happened to represent the firm of Douglas-Elliman & Co., and I met Douglass Elliman for the first time and told him I thought he could sell his co-operative apartments on the installment plan through an acceptance company, and he was very eager about the idea. He liked it and thought it would be very beneficial to his business.

Mr. Curley: May it please the Court, I do not want to interrupt, but I think it might be material for the witness to state what he had to do with the formation of the corporation as such, but I think this is going beyond.

The Court: Where is it pertinent at all, Mr. Finger?

Mr. Finger: The only reason I am going into it, is because of the issues raised as to the competency of the plain-[fol. 49] tiff, and I want to show how the plaintiff conceived the unique character of this company and caused it to come into existence, as one of the elements going into the question of his competency to manage the company.

The Court: All right.

A. (Continuing:) After talking it over with Mr. Elliman, and because of his interest in the matter, I got together a group of real estate people, consisting of half a dozen of the leading firms of New York and we had a meeting uptown——

The Court: Just a moment, is the burden of competency yours, or is lack of competency the burden of the defendant, Mr. Finger?

Mr. Finger: We understand that the burden is on the defendant, but we thought that since the issue is here, and

the two more or less are together in our case, we thought we would put in our whole case first.

The Court: All right.

Mr. Curley: On counsel's statement, it may be that this witness' connection with the formation of the corporation and bringing it to existence as it was said, may have some usefulness to some issue in the case; but I do not see what all these conversations with Tom Jones and Dick Johnson and anybody else, has to do with it.

The Court: From Judge Finger's opening, it seemed to me that the plaintiff's case—I am not trying to suggest it, I was only trying to narrow it, and shorten the evidence, is established when you offer and prove the contract and its breach, and then the non-payment of the $10,000, and the non-payment of the three years' salary from December, [fol. 50] 1926, to December, 1929—it seems to me that establishes the plaintiff's case, does it not?

Mr. Finger: Yes, sir, I would so understand.

Mr. Curley: That would not, in my view, establish the full plaintiff's case, if the plaintiff expected to have any recovery of damages. I take it that the settled law——

The Court: He would have to show that the damages had been—that he had not been able to minimize those damages.

Mr. Curley: Yes. That is what I mean, he would not be entitled to the salary as such, without showing——

The Court: So I am wondering whether that would not come before any rebuttal—in anticipation. It seems to me the issues are cleaner cut and more sharply defined, if the contract is proved and admitted. I assume the resolutions of dismissal will be admitted too, won't they, Mr. Curley? Now then, why not put this in?

Mr. Finger: Yes, sir, we will follow your Honor's suggestion.

The Court: I am only trying to keep that sharply in my mind.

Mr. Curley: I will say to the Court that counsel have an understanding whereby the minutes of both these corporations are in court, produced by us.

The Court: All right.

Mr. Finger: Yes, sir. After the execution of that contract was authorized, then Mr. Leavitt presented this letter.

The Court: Unless the minutes record the thing inaccurately, I do not see there is anything to show, is there?

Mr. Finger: The point of it is, as the testimony will show, that at the time the directors adopted the resolution authorizing the execution of the contract, the directors in fact, did not know that the letter had been written or was going to be presented, with the exception of one director; so that the contract was not executed on the basis of this letter.

The Court: At the time of the resolution?

Mr. Finger: That is not only confirmatory, but also shows the directors, with the exception of one director, did not know the existence of the letter.

The Court: Do you want to be heard, Mr. Curley?

Mr. Curley: If your Honor is in doubt, I would like to be heard further.

[fol. 65] The Court: I will hear you. I should assume that he did not know of its existence, that is, in view of the sequence in the minutes book.

Mr. Curley: I suggest this—an offer is made to the meeting by this witness in the form of a written communication read to the meeting in which he says—I shall do a certain thing, in my capacity as president of the corporation, with reference to my salary. Now, then, the minutes show that that thing is followed almost immediately afterwards by his election as president by the directors. One is made on the basis of the other, and the contract has not yet been executed.

The Court: The resolution authorizing its execution?

Mr. Curley: The resolution authorizing its execution has been passed according to the minutes, but the contract has not been executed.

The Court: But is not that a ministerial act, let me get straightened out on that. It seems to me that you and I, the four of us, sitting in the board of directors, might authorize the employment of Mr. Mahaffy—we authorize the officers to execute a certain contract employing Mr. Mahaffy for a period of five years. Now what is done. The contract has not been executed. That is a form, but it has been authorized. Then Mr. Mahaffy then says after that

has all been done—notwithstanding your authorization, and notwithstanding that I am willing for the first year, or I propose for the first year to retain in the treasury of the corporation, a portion of the salary I am now authorized to be paid—it seems to me it is a voluntary act, Mr. Curley, after the authorization.

[fol. 66] Mr. Curley: May I suggest this to your Honor, and I won't take up any more time—this corporation passed a resolution authorizing its officers to enter into a certain agreement with the witness, and so far as I know it is entirely competent for that corporation at the same meeting to reconsider that vote. Now then, that is the status. Upon its reconsideration this man has no right, legal rights against the corporation, because of the action of the directors in authorizing a certain contract with him; he can only acquire those rights from the de facto acts of the officers under that resolution. The status is that the board of directors has passed a resolution authorizing the officers of the corporation to enter into a contract with him, but the contract has not yet been executed. A part of the contract, the material part, calls for his election as president by the board of directors. Prior to his election as president by the board of directors at the time that it is competent for the directors to call off the entire authorization to enter into the contract, this witness, according to the minutes, says to the directors: I offer to leave $10,000 of my first year's salary to be unpaid until such time, whatever it may be, that the common stock of this corporation shall pay a dividend. That letter recited by the minutes, was read to all the directors present, according to the minutes. On the basis of that, I mean after that, immediately, the directors then present do the thing which the contract would oblige them to do, if executed, which they were not at that time obligated to do, namely, elect this witness as president of the corporation—if your Honor sees the point.

The Court: You make the point very clear.

[fol. 67] Mr. Curley: My second idea of that is this—that if the minutes recite that a given communication was read to the board of directors, it is prima facie correct. It might be competent to counsel to inquire from the witness whether he can say that some director who was present—contradicting the minutes, did not hear it read.

The Court: He is not trying to contradict.

Mr. Curley: His question was—will you tell me how many directors heard it read?

The Court: No. How many, if any, of the directors knew of the letter's existence at the time of the adoption of the resolution authorizing the execution of the contract; that is as I understand the question.

Mr. Finger: Yes, sir.

The Court: So I will overrule the objection to that, because I think that is merely confirmatory of the minutes as entered.

Q. Can we have the question, Mr. Smart?

(Question repeated as recorded.)

A. As far as I know, Mr. Leavitt was the only director that knew anything about it.

Q. What happened just before Mr. Leavitt read the letter to the meeting?

A. Mr. Leavitt came to my place at the dircetors' table and asked me if I was really in earnest about this letter, if I really wanted it read, expressing the thought that it was not necessary, and wanted to know if I really wanted him to do so. I said: "Yes, go ahead and read it"; and he went back to the chair and read it.

[fol. 68] Q. Was that before the resolution authorizing the execution of the contract had been adopted, or after?

A. That was after.

Q. At this point, your Honor, I would like to read the agreement (reading):

"Agreement, dated September 23, 1924, between Realty Acceptance Corporation (a Delaware corporation), hereinafter called the Employer, party of the first part, and Henry G. Montgomery, of New York City, hereinafter called the Employee, party of the second part;

"Whereas, the Employee has heretofore entered into an agreement of employment in writing with The Stuyvesant Corporation (a New York investment company), a copy of which is annexed hereto, marked Exhibit 'A', and made a part of this Agreement; and

"Whereas, the Employer wishes to secure the services of the Employee as its President for a period from the date hereof to and including December 31, 1929;

"Now, therefore, this agreement witnesseth: that in consideration of the premises and of the mutual covenants hereinafter set forth and of One Dollar ($1) and other good and valuable consideration paid and delivered by the Employee to the Employer at and before the execution and delivery hereof, the receipt whereof by the Employer, is hereby acknowledged, the parties hereto have agreed and by these presents do hereby agree as follows:

"First. The Employer agrees to employ the Employee as its President and as the President of any subsidiary corporation or corporations through which during said period it may conduct business in the State of New York, and to pay the Employee for his services as its President and as President of any such subsidiary corporation or corporations, a salary from October 1, 1924, to and including De- [fol. 69] cember 31, 1929, at the rate of Twenty-Five Thousand Dollars ($25,000) a year, payable in equal monthly installments. All payments made during such period to the Employee by The Stuyvesant Corporation pursuant to the provisions of the agreement marked Exhibit A and annexed hereto and/or all payments made during said period to the Employee as salary by any such subsidiary corporation or corporations shall discharge the Employer pro tanto from the payment of salary to the Employee hereunder.

"Second. The Employee agrees to act as President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations for a period from the date hereof to and including December 31, 1929, and during such period to devote his time and endeavors exclusively to the best interests of Realty Acceptance Corporation, The Stuyvesant Corporation and any such subsidiary corporation or corporations, and to perform the duties of the President of Realty Acceptance Corporation and of any such subsidiary corporation or corporations to the best of his ability.

"In witness thereof."

Q. Now, Mr. Montgomery, following the execution of this contract, did you enter upon the performance of your duties thereunder?

A. I did.

Q. And did you perform all your duties under the contract?

A. I consider that I did. I devoted my entire time exclusively to that business.

Mr. Curley: Read that answer.

(Question and answer repeated.)

That is a conclusion, but I won't object.

Q. How long did you continue to devote yourself to these duties and to perform your duties under the contract?

[fol. 70] A. Until I was removed from office.

Q. Mr. Montgomery, did you also likewise perform your duties under the contract with The Stuyvesant Corporation?

A. I did.

Q. And how long did you continue to perform those duties?

A. Until I was removed from the position of president of that company.

Q. Did you likewise as to The Stuyvesant Corporation devote your entire time exclusively to the interests of The Stuyvesant Corporation?

A. I did. They were operated as a joint company, practically.

Q. Was there any other subsidiary of the Realty Acceptance Corporation to whose business you were required to devote yourself in your contract with the Realty Acceptance Corporation?

A. No.

Mr. Finger: I now desire to offer in evidence the minutes of the special meeting of the Board of Directors of Realty Acceptance Corporation, held November 22, 1926, and desire particularly to read the following resolutions beginning on page 2 of those minutes——

Mr. Curley: Will you indulge me just a moment. There is no objection to those minutes.

The Court: The minutes are admitted.

(Received in evidence and marked "Plaintiff's Exhibit No. 5.")

Mr. Finger: I desire now to read from Plaintiff's Exhibit No. 5, beginning at page 2 of these minutes.

"Resolved that it is the opinion of this Board that it is for the best interests of this corporation and the Stuy-

[fol. 71] vesant Corporation, that all agreements between this corporation and/or the Stuyvesant Corporation and Henry G. Montgomery be forthwith terminated. Further resolved——"

The Court: Please start again.

Mr. Finger: "Resolved that, it is the opinion of this Board that it is for the best interests of this Corporation and The Stuyvesant Corporation that all agreements between this Corporation and/or The Stuyvesant Corporation and Henry G. Montgomery be forthwith terminated.

"Further Resolved that an offer be and it hereby is made to Mr. Montgomery, without prejudice, to arbitrate, pursuant to the provisions of the law of the State of New York, any and all rights, claims and obligations of a pecuniary nature arising from said agreements or any of them.

"Further Resolved that such offer shall expire by limitation, unless accepted by Mr. Montgomery by writing, addressed to Mr. E. P. Earle, on or before 3 o'clock P. M. on Wednesday, November 24, 1926.

"Further Resolved that the proper officers of this Corporation be and they hereby are authorized and directed, on behalf of this Corporation, to enter into such agreement or agreements of arbitration embodying the purposes of these resolutions, as may be approved by Messrs. Satterlee and Canfield.

"Further Resolved that a copy of these resolutions, certified by the Secretary of this Corporation, be delivered to Mr. Montgomery."

"The above resolutions were duly adopted, Mr. Montgomery voting in the negative."

Now, I desire to offer in evidence, minutes of the special meeting of the Board of Directors of The Realty Acceptance Holding Corporation, December 2, 1926.

[fol. 72] Mr. Curley: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 6.")

Mr. Finger: I desire to read from this Plaintiff's Exhibit No. 6, at the bottom of page 1, of these minutes:

"Mr. Brown stated that it would be necessary, in view of Mr. Montgomery's refusal to arbitrate any rights which he might have under an alleged contract of employment with the Corporation, to call this meeting for the purpose of removing Mr. Montgomery as President of the Corporation, so that new management, satisfactory to the owners of a majority of the stock of the Corporation, might be immediately installed. Thereupon the following resolution was duly moved and seconded, to wit:

"Whereas a request has been made by the owner, or owners, of the majority of the stock of this Corporation for an immediate change in the management of the Corporation; and

"Whereas it is the opinion of this Board of Directors of Realty Acceptance Corporation that the management of the affairs of said Corporation under the direction of its present President, Henry G. Montgomery, has not been satisfactory; and

"Whereas an immediate change is deemed advisable;

"Now, therefore, it is

"Resolved that Henry G. Montgomery be and he hereby is removed from the office of President of Realty Acceptance Corporation, such removal to take effect immediately and said office of President of Realty Acceptance Corporation is hereby declared vacant.

[fol. 73] "Resolved that the Secretary of Realty Acceptance Corporation be and he hereby is authorized and directed to mail to Henry G. Montgomery at his last known address a duly certified copy of these resolutions.

The adoption of the foregoing resolution was thereupon duly moved, seconded and carried.

"Mr. Montgomery instructed the Secretary to record his negative vote in the resolution as being opposed to the best interests of the Corporation. Mr. Nichols then asked Mr. Montgomery if it would not be bet-er to say that Mr. Montgomery believed that such resolution was against the best interests of the Corporation. Mr. Montgomery, however, replied that he would not change his position and that he intended to hold personally responsible the Directors of the Corporation for any damage to the Corporation or to him personally."

Q. Mr. Montgomery, following the adoption of the resolutions of November 22, 1926, and December 2, 1926, that I have just read, did the Corporation pay your salary, and if so, up to what time?

A. I think my salary was paid until December 31, 1926.

Q. Up until that time, did you continue to perform your duties under the contract?

A. I did.

Q. Did you perform any duties after December 31, 1926?

A. I do not recall that I did.

Q. Why not?

A. I had been dismissed from office.

Q. Because you were dismissed. Were you at that time ready and willing to continue to perform your duties under the contract?

A. I was.

Q. Has the corporation paid you any salary since December 31, 1926?

[fol. 74] A. They have not.

Q. Has the corporation paid you the balance of $10,000 due on your first year's salary?

A. They have not.

Mr. Curley: I object to that, that is assuming that any balance was due.

The Court: The form of the question is immaterial, I understand.

Mr. Curley: Your Honor understands.

The Court: Yes. We might as well put it in the proper way; in a way that does not call for a legal conclusion, as to how much he received on account of his salary for the two years' services that he rendered.

Q. How much salary was in fact paid you by the corporation from the period October 1, 1924, to December 31, 1926?

A. I do not remember exactly what it was, but it was at the rate of $25,000 a year, less $10,000 of the first year's salary, which the company retained.

Q. And then you have been paid all that you claim to be due you during that time, except $10,000?

A. That is right.

Q. And that $10,000 has not yet been paid?

A. It has not been paid.

Q. You are claiming that $10,000 now among other things, are you not?

A. I do.

Q. Mr. Montgomery, where did The Realty Acceptance Corporation conduct its business?

A. At 331 Madison Avenue, New York City.

Q. Did The Realty Acceptance Corporation or the Stuyvesant Corporation conduct business anywhere except in New York City?

[fol. 75] A. They had an office in New York City, which I think was the only office, unless you consider some official notation in Wilmington where we were required to keep some sort of a theoretical office.

Q. But aside from the statutory office in Delaware, did the corporation conduct business anywhere except in New York?

A. We made loans in Jersey City and on Long Island, but we had no office anywhere except at 331 Madison Avenue.

Q. Where was this contract between you and the corporation, in fact entered into?

A. In the office of Paine, Webber & Company.

Q. What city?

A. New York City.

Q. And where was the contract to be performed, in what city?

A. New York City.

Q. Mr. Montgomery, with reference to the letter pertaining to the $10,000, did you ever receive any consideration in any form for that offer or that letter?

Mr. Curley: Is not that a conclusion?

The Court: I think that is a conclusion. I assume, Mr. Curley, that there is no contention here he ever did, and that it constituted part of the contract in some way?

Mr. Curley: Yes, sir.

The Court: That is a legal question.

Mr. Curley: We have not paid the $10,000.

The Court: And he received nothing for his offer unless the contract itself was a consideration for the offer; is not that it? Unless his $10,000 proposition entered into the negotiations and culminated in the contract on your part, he got nothing from you for that?

[fol. 76] Mr. Curley: I would like to distinguish there, if your Honor please—I am glad you asked me the question. Our position will not be that part of the consideration moving from Montgomery to the Corporation for the Corporation's contract with him was the signing away of the $10,000—our position is over and above that. At a time in the meeting where this contract was authorized, at the time when the directors——

The Court: I got that point, but I am afraid I do not make myself clear; that the authorization is here and it was done for the contract. That is, as I understand your contention, before the execution of that contract, he interposed a letter, and the proposition then became merged in and formed part of the consideration for his actual election and for the execution and delivery of the contract to him.

Mr. Curley: Certainly for the actual election.

The Court: There is no contention on your part that he received any consideration from the corporation for that proposition unless it be found in the execution of the contract, or in his election as president?

Mr. Curley: Yes, sir.

The Court: You do not contend it was otherwise, do you, Judge Finger?

Mr. Finger: No, sir.

The Court: So that issue is out of the way. Then that is a legal question mainly, I take it?

Mr. Finger: And that question may be withdrawn then?

[fol. 77] The Court: Yes, because you have now agreed on the facts.

Q. Mr. Montgomery, did the writing of this letter or the presentation of this letter have anything to do with the corporation entering into the contract with you?

Mr. Curley: Is not that a legal proposition? It is competent for the witness to state facts on which your Honor can draw a conclusion.

The Court: I think that is a conclusion, Judge Finger. I am afraid that is the question I have got to answer.

Mr. Finger: What I am after is to see whether there are not facts——

The Court: If there is any element of fact there which you need to get out, I will have to leave it to you; but I think the question now asked calls for a legal conclusion.

Mr. Finger: I do not want to press this.

The Court: Make your record. Go ahead and present any question that you want.

Mr. Finger: Yes, the only thing I am after is to show facts from which it seems to me that your Honor may be aided in reaching the legal conclusion.

The Court: The only reason I sustained this last objection is because it seems to me your question does call for a conclusion instead of a statement of fact.

By Mr. Finger:

Q. Mr. Montgomery, did anything transpire prior to the adoption of the resolution authorizing the execution of the contract, or prior to your election as president, aside from [fol. 78] the mere presentation of the letter, which the minutes show was presented, that had any bearing upon the action taken by the directors in authorizing the contract, or in electing you as president?

Mr. Curley: The same objection.

The Court: I think the last part of the question, as it seems to me, is a little different—whether there was anything that had any bearing; that in a sense is a conclusion, but I do not know how you could ask him to detail that.

Mr. Curley: My position is this: Either the witness knows certain facts which would help in a conclusion on this, or he does not. If he does not know them, we have a right not to have his testimony come in as to what he thinks the effect of them might have been. If he does know them, I think he ought to distinctly state them.

The Court: I am assuming the way the case is being presented that there were no facts except the presentation of the letter, and that the thing went on then as indicated by the minutes, and solely by the minutes. The plaintiff is attempting to prove a negative there, and it seems to me he does not need to, but he may do so if he wants.

Mr. Curley: But if your Honor please, there is one more thought. This question, no matter how you look at it means this: Did anything transpire at the meeting other than the reading of the letter, which influenced, or could have influenced the directors in their action? That is the substance of my friend's last question. Now, look at that in any way that you want, but you cannot avoid the fact

that it contains an obvious conclusion to be drawn by this witness. He cannot say what influenced the directors. If [fol. 79] certain facts occurred, I think he is entitled to state those facts and allow your Honor to conclude what the effect of these facts ought to have been on the directors.

The Court: That would be entirely all right if he were attempting to prove the affirmative, but here he is attempting to prove the negative; and I do not see how he can, from a question. If I assume nothing did transpire, save as recorded in the minutes, I do not know how he can ask the question, except in this way.

Mr. Curley: He might say—what else occurred at the meeting.

The Court: I do not think so. I am not interested in what occurred save as it had a bearing or related to this subject-matter.

Mr. Curley: Then suppose he were asked what else occurred at the meeting that had any bearing on the position?

The Court: That is the general question he has asked him.

Mr. Curley: No—in connection with the matter.

The Court: That is the substance of the question.

Mr. Curley: The vice, I take it, is his last question naturally contains a conclusion on his part, as to what effect certain things had on the directors.

The Court: Won't you read it, Mr. Smart?

(Question repeated as follows: "Mr. Montgomery, did anything transpire prior to the adoption of the resolutions [fol. 80] authorizing the execution of the contract or prior to your election as President, aside from the mere presentation of the letter, which the minutes show was presented, that had any bearing upon the action taken by the directors in authorizing the contract or in electing you as President?")

I think I have your point and I think the question is all right.

Q. Will you answer that, Mr. Montgomery?

A. I think that a good deal happened prior to the directors entering into that contract, that influenced them to do so. I think the fact that I had initiated this business and organized and was—practically the only person—

Mr. Curley: I must object, because I think the witness's answer ought to be confined to the terms of the question. The question was whether anything transpired at this meeting, and certainly this witness's present answer is not in the terms of that question.

Q. Mr. Montgomery, will you direct your answer with reference to this letter?

The Court: And what transpired at the meeting?

A. Nothing took place except the bringing forward of that letter but if you asked me what influenced the directors to reach the conclusion, I will have to answer differently.

Mr. Curley: That has not been asked.

Q. Now, do you know whether this letter had anything to do in the way of influencing the directors authorizing the execution of this contract or electing you as president?

[fol. 81] Mr. Curley: Objection.

The Court: The objection to that is valid unless it be revealed by the statements at the meeting or other acts at the meeting, because you are now asking for their state of mind, and also as to their acts.

Q. May we have that question read.

(Question repeated as follows: "Mr. Montgomery, did anything transpire prior to the adoption of the resolutions authorizing the execution of the contract or prior to your election as President, aside from the mere presentation of the letter, which the minutes show was presented, that had any bearing upon the action taken by the directors in authorizing the contract or in electing you as President?")

The Court: As indicated by the acts or statements of the directors at the meeting?

Q. As indicated by the statements or actions of the directors at the meeting?

A. The authorizing of the contract was made before the letter was read, so that I do not think the letter influenced that. The election of the president took place afterwards, and in my opinion, the reading of the letter had no effect——

The Court: The last part—"in my opinion" and what follows, goes out.

Mr. Curley: Even then if the Court please, the answer remains that something did not influence the directors, and that is necessarily a conclusion on the witness's part as to what was in their minds.

The Court: I do not think that is in. Read the last part of the answer.

(Answer repeated.)

[fol. 82] Mr. Curley: Had no effect—he is speaking of the effect on the directors. That is the only possible use there.

The Court: It was presented apparently prior to the authorization of the execution.

Mr. Curley: The basis of my objection is this, the present answer as I understand it means this: That the letter, while read before his election as president, had no effect—that is where it stops—upon his election as president; that necessarily presupposes a knowledge on his part.

The Court: We are in accord in our points of view, but we are not in accord as to what the witness has said. Read it. (Answer repeated as recorded.) That expression of opinion is harmless—"took place afterwards"—that is where the answer stops.

Mr. Curley: If your Honor thinks that.

The Court: I struck the other part out in the beginning of my ruling.

Mr. Curley: So that it reads now, that last part?

(Here the stenographer repeated the answer as recorded.)

The Court: Stop at "The election of the president took place afterwards."

Q. Mr. Montgomery, state whether you know whether the reading of the letter had anything to do with your election as president, and on what you base any such statement?

The Court: I think that is bad, Mr. Finger, because you [fol. 83] are asking for an opinion, and then to justify his opinion. I think you are entitled to have me say this—

that you might ask him, as I now see it, whether there was any discussion or anything said about his letter or offer after the letter was read, because that is the only thing.

Q. Mr. Montgomery, was anything said or done at the meeting after the letter was read and before you were elected as president, pertaining to the letter?

A. There was no comment on it.

Mr. Finger: Now I presume we should have in evidence the minutes of the meeting of the Stuyvesant Corporation of November 22d.

The Court: Where does that have any bearing?

Mr. Finger: Because under the contract, Mr. Montgomery was obliged to perform the duties not only of the president of the Realty Acceptance, but also the Stuyvesant.

The Court: Why not eliminate that by agreement, unless it has some bearing. I have not thought there was any defense on that Stuyvesant proposition—was there?

Mr. Finger: Are you willing to stipulate that certain resolutions with reference to the termination of the contract and removal were adopted by the Stuyvesant Corporation?

Mr. Curley: I think your minutes should be in to rely on. I am not quite clear—your Honor probably may have it in mind—this pleading against this defendant is based on its breach of contract, a two-fold breach. It is said that it contracted first to keep this witness as its president for a period of five years approximately. Not only that, but [fol. 84] to keep him as president of a subsidiary corporation, another corporation entirely, for the period of five years. It is a very unusual form of contract. I never came across anything like it; but the defendant's obligation is counted on here as being two-fold; first, to keep him as president also to keep him as president during the same period of another corporation whose stock was owned by the first company. Now, the legal propositions having to do with the right of the second corporation to do away with these services without respect to the contract, are along the same general line as the defendant's right to do away with the services as president, without reference to the binding character of any such contract. I think coun-

sel should put in whatever he thinks needed to state his case.

Mr. Finger: Will you please present the minute book of the Stuyvesant directors, showing the meetings held on November 22, 1926?

The Court: We will take our mid-morning five-minute recess now.

(After a short recess.)

Mr. Finger: I now offer in evidence minutes of the special meeting of the directors of the Stuyvesant Corporation held December 9, 1926.

Mr. Curley: The meeting of the Stuyvesant?

The Court: Admitted.

(Received in evidence and marked "Plaintiff's Exhibit No. 7.")

Mr. Finger: I am not going to take the time to read them, your Honor, except all I want to do is to say that that meeting in these minutes contained resolutions similar to the resolutions of removal by the Realty Acceptance, [fol. 85] and it is offered as being pertinent, because under the contract the plaintiff has a duty to perform with the Stuyvesant Corporation. This is showing a reason for failure to perform beyond December 31st.

Q. Mr. Montgomery, does your testimony respecting the payments that you have received under your contract with the Realty Acceptance Corporation include all payments received from the Stuyvesant Corporation?

A. They do.

The Court: Had he received any money from the Stuyvesant Corporation or money received from the defendant, which?

Mr. Finger: It is really immaterial because under the contract whatever he receives is pro tanto deducted.

The Court: What he received was the aggregate of his receipts for salary from both corporations?

Mr. Finger: Yes, sir.

The Court: I see.

Q. Now, Mr. Montgomery, subsequent to your dismissal in December, 1926, did you make efforts to obtain other employment of a similar nature?

A. I did.

Q. What did you do to try to obtain other similar employment?

A. I advertised in the New York papers. I talked with my friends that I thought might be in a position to assist me, and I found myself handicapped, however, by the fact that I had been dismissed from a corporation that had a distinguished lot of men on its board——

Mr. Curley: I could not hardly anticipate from the question asked, what did he do in the endeavor to procure other employment.

[fol. 86] The Court: I think that answer is correct. He is not asking for punitive damages.

Mr. Curley: There is no claim for special damages in the case.

Mr. Finger: That is abandoned.

Mr. Curley: Then I do not think it is material.

The Court: I think it is all right.

Q. Continue, Mr. Montgomery.

A. Many of my friends advised me that my best opportunity would probably lie along the lines of letting this dismissal and the damage that it had done me, blow over or to be forgotten before I made intense efforts to place myself with another corporation in a similar position. I advertised on one or two occasions—I recall advertising in March in the New York papers, and I am still negotiating for some position of an executive character.

Q. When I asked you whether your efforts were toward obtaining similar employment, what, in fact, was the similar employment which you were seeking to obtain?

Mr. Curley: At this point I object. As I understand the law, a discharged employee's duty is to get any employment for which he is fitted; that is, because he could not get another position as an executive of that kind of a corporation, would be no excuse for sitting down idly during the rest of the period of employment.

The Court: The immediate question is, what employment he did seek.

Mr. Curley: But counsel puts it in the way of similar employment.

[fol. 87] The Court: This question is broad enough to allow him to tell what efforts he made to get any employment.

Q. May we have that question read?

(Question repeated as follows: "Q. When I asked you whether your efforts were toward obtaining similar employment, what in fact was the similar employment which you were seeking to obtain?")

A. It was very difficult to get similar employment because the character of the work that I had been doing as president and general manager of the business of The Realty Acceptance, was highly specialized, the only company doing——

Q. The point I am trying to have you make known to the Court, is whether any of your efforts were toward any executive employment?

A. I would have taken any executive employment?

Q. Were you seeking any executive employment?

A. I was seeking any executive employment that would have been suitable.

Q. What had been the nature of your employment before you went into The Realty Acceptance Corporation?

A. I was assistant to the president of the New York Telephone Company.

Mr. Curley: Is that prior to his appointment?

Mr. Finger: Yes.

Q. Were you able to obtain any employment suitable to the—any employment comparable to the general nature of the employment in which you were engaged with The Realty Acceptance Corporation, prior to that time?

A. I was not.

Mr. Curley: I do not know what your Honor's view is, but I candidly do not like the terms "comparable" and [fol. 88] "suitable" in the question. In my view of the question, I think a discharged employee has a right to the balance of the term, less whatever he earned, or reasonably could have earned during that same time.

The Court: Yes, but the law does not require, as I understand it, a man who was president of the New York Telephone Company, for instance, to take employment as a street sweeper.

Mr. Curley: No, indeed.

The Court: And I do not understand that Mr. Finger, by his question, is trying to draw any line other than which

is established by the law. He has used the word "similar" and has had the witness show what he meant by that term. Now, he is using the word "comparable," and if the line is not drawn finely enough, you can bring that out on cross-examination.

Q. May we have that question read?

(Question repeated as follows: "Were you able to obtain any employment suitable to the—any employment comparable to the general nature of the employment in which you were engaged with The Realty Acceptance Corporation, prior to that time?")

Have you in fact, earned anything, or received any earnings from services in any employment, since December 31, 1926, down to the present time?

A. I have not—as I understand your question.

Q. Now, Mr. Montgomery, are you a member of any firm?

A. I am a partner in the Stock Exchange firm of Palmer & Co.

Q. When did you become a partner in that firm?

A. June first of this year.

[fol. 89] Q. Do you now receive, or have you received, since June 1st of this year, any salary from Palmer & Company?

A. I do not receive any salary.

Q. Do you receive any compensation by way of earnings for services with Palmer & Company?

A. I receive a return upon the capital which I have invested in the business.

Q. Did you in fact invest capital in order to become a member of the firm?

A. I did.

Q. Was that a substantial sum of capital?

A. I should say so, yes.

Q. And are you now receiving, and have you, since June 1st of this year, received any returns by way of salary or earnings or any returns other than from your invested capital in the firm?

A. I have not.

Q. Now, you testified a little while ago that you advertised for other employment. I hand you a page from the

issue of the New York Sun of March 22, 1927, and call your attention to an advertisement on the last column, circled in lead pencil; is that an advertisement which you caused to be inserted in that paper?

A. That is the advertisement I caused to be published in that and other papers.

Mr. Finger: I offer that in evidence.

Mr. Curley: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 8.")

Mr. Finger: I also call your attention to an advertisement encircled in lead pencil on a page of the New York Times of the same date, and ask you if that advertisement was also caused to be inserted by you?

[fol. 90] The Witness: It was.

Mr. Finger: I offer that in evidence.

Mr. Curley: State what they are.

Mr. Hicks: State what advertisements they were.

(Received in evidence and marked "Plaintiff's Exhibit No. 9.")

Mr. Finger: (Reading Plaintiff's Exhibits 8 and 9.)

Q. Now, you testified a while ago that you have been seeking other employment for some time. Are you still seeking other employment?

A. Yes, I am working on the possibility of obtaining an executive position with prominent people in the Middle West at the present time.

Q. Of course, you do not know whether that will materialize or not?

A. I do not know.

Q. Mr. Montgomery, at the time of your removal as president, you were still a director of the corporation, were you not?

A. I believe I was. The dismissal in the position of president and director, I think took place at about the same time. Perhaps at the same meeting. I think, Mr. Finger, I was removed as a director at a meeting of the stockholders at the end of the year, after I had been removed from the position of president.

Mr. Finger: Cross-examination.

Cross-examination.

By Mr. Curley:

X Q. Mr. Montgomery, it was in June of this year that you became a partner in Palmer & Company?

A. I am sorry I cannot hear you very well.

[fol. 91] X Q. Mr. Montgomery, it was in June of this year that you became a partner in Palmer & Company?

A. Yes, sir.

X Q. That was a stock exchange house?

A. Yes, sir.

X Q. Having a seat on the New York Stock Exchange?

A. Yes, sir.

X Q. Now then, prior to June of this year, what, if any connection of any kind did you have with the firm of Palmer & Company?

A. I made my office there, and I employed my own capital in a joint account with Palmer & Company, in which we took speculative investments in certain securities in which my judgment was employed. The business of which was the employment of my judgment, in the joint venture in which my capital and a part of Palmer & Company's capital were employed.

X Q. Would this be correct then, that prior to June 1st of this year, you had an office with Palmer & Company or rather you made your office with Palmer & Company and engaged with them in joint speculative or investment speculations?

A. That is correct.

X Q. And for how long a time prior to June 1st, did that continue?

A. I think that started in September of 1927.

X Q. Then from September, 1927, until June 1st, 1928, you were engaged, as you have just described?

A. Yes, sir.

X Q. Now then, during that time were the ventures of yourself and Palmer & Company, these joint affairs, financially successful?

Mr. Finger: Wait a minute. I object.

The Court: As I see it now, the objection is well taken, Mr. Curley.

[fol. 92] Mr. Curley: I would like to be heard a moment on this.

The Court: That is as I see it now.

Mr. Curley: As I understand, a discharged employee has a right to recover the balance of his term, less what he earned, or reasonably could have earned during the period of the unexpired term. Quite apart from the question of similar or like or fitting employment, the question comes down to what he did in fact earn prior to his discharge.

The Court: That is not an earning in the legal contemplation.

Mr. Curley: I suggest this to your Honor, prior to the time of this alleged discharge, he was acting as president of those two companies, under an obligation to give them the whole of his time.

The Court: Yes.

Mr. Curley: Now then, subsequent to his discharge, he engaged in certain business ventures——

The Court: No, no. He said speculative ventures. He said "speculative."

Mr. Curley: At all events, that required time. He made his office with this house.

The Court: No. I do not understand that, Mr. Curley. He had a place there where he probably had a desk and a chair. So far as I see now, he had no business there. It was a place in which he may have kept his records or data with respect to his friends' joint speculative activities. I do not think that has any bearing on the issues here.

Mr. Curley: Any damages he may suffer would be reduced by what he earned in any way.

[fol. 93] The Court: That is not earnings—it was speculative activities, that cannot be called that. It is income, but not earnings from personal services.

Mr. Curley: If I make myself clear, your Honor, this is not a case, as I understand it from the testimony, of somebody who was engaged as a lawyer or a doctor or tinsmith, or something else, requesting his broker to buy him a few shares, and either making or losing something on the deal. This is a case of a man, who, according to his testimony, has his office at a given investment house, a broker's office, and his business for a year prior to June 1st, has been on

the investments with that house. Now, it would occur to me that those activities require time——

The Court: That is not the testimony.

Mr. Curley: That is what I understand his testimony to be.

The Court: I do not so understand it.

Mr. Curley: Can we have read his testimony on that, if your Honor please? Maybe I am mistaken. Read, Mr. Smart, the witness's testimony as to how his time was spent from June first.

(Record repeated as desired.)

The Court: Put that question as you want, Mr. Curley, but as I understand the testimony, you suggested it was investment, and the witness replied "speculative."

Mr. Curley: I think the answer was speculative investment.

The Witness: No, it was speculative; it was not investment.

[fol. 94] The Court: That is what I understood him to say awhile ago, the fruits of his speculation, whether they were profits, I think have no bearing on the issues here.

Mr. Curley: Even though that required daily time from him every day in and about that business?

The Court: That was not a return for services. I think the objection is well taken. You may put such other question as you want.

Mr. Curley: Exception.

The Court: Yes.

X-Q. Now, then, since June first of this year, you have been a partner in the house of Palmer & Company?

A. Yes, sir.

X-Q. And what have been the returns to you as a partner in that house from June first to the present time?

Mr. Finger: I object.

The Court: Objection sustained. His testimony so far is that the return has been a return on invested capital and not for services.

X-Q. Have you testified already in the case that the only return that you had so far from your partnership in Palmer & Company has been a return on the capital that you have invested in that firm; has that been your testimony?

Mr. Finger: I object. That is improper. The testimony speaks for itself.

Mr. Curley: I do not recollect, but I want him to say.

[fol. 95] Mr. Finger: The testimony was he received no salary or income for his services in the firm. He has not said whether he had any earnings, and I think whether he had any earnings or income or loss of money is immaterial.

The Court: So far, it is my understanding and my recollection of the testimony that he says it was purely a capital investment. I do not mean in those exact words, but an investment is what I understand it to be. You asked whether the capital was invested as capital, and he said—I should say so; is not that so?

Mr. Finger: Yes, sir.

The Witness: I can not predict——

Mr. Finger: Wait a minute, Mr. Montgomery, there is nothing.

Mr. Curley: May I have your Honor's ruling?

The Court: I think the question is bad in form, but the substance, if put in another form is not exceptional.

X Q. What return have you so far had of any kind from the partnership of Palmer & Company?

Mr. Finger: Objection.

The Court: I think that objection is well taken. I think the inquiry here is whether he has had any return for his services or whether any return he has had has been derived solely from capital invested.

X Q. What are your duties, what are your activities in the house of Palmer & Company?

A. That of a general partner.

[fol. 96] X Q. That of a general partner; what demands has that made on you for your time?

A. That takes up practically all of my time now.

X Q. Since June first of this year, your activities and duties as a partner of Palmer & Company has taken up practically all of your time?

A. That is true, but it has increased my opportunity to find other employment, because it has restored my prestige to some extent.

Mr. Curley: I ask that the last be stricken out as it is not responsive.

The Court: It may have some value. I deny the motion. I do not know it is detrimental to your side.

X Q. Prior to June first of this year, how much of your time was physically taken up with the joint speculative investments of yourself and Palmer & Company?

A. The speculations that I engaged in with Palmer & Company took only a portion of my time.

X Q. And about what portion?

A. One-third perhaps.

X Q. One third. Then do I understand it that from September of 1917, approximately to June 1, 1928, that practically one-third of your time, your ordinary working time during business hours was consumed with the activities, the joint activities of yourself and Palmer & Company in the line of speculative investments?

A. Speculation—not investment. I took up practically one-third of my time, perhaps more, but I think it is only fair to say that much of that activity was directed towards the end of restoring my chances of finding employment elsewhere.

X Q. Now, Mr. Montgomery, prior to June 1st of this year, how much of your time, daily time, was spent with Palmer & Company? What were your hours, if you had any?

[fol. 97] A. I had no regular hours.

X Q. About what of your physical time, daily time, during business hours, were spent with Palmer & Company?

A. I was there from 10 to 12, and sometimes from 2 to 3.

X Q. Was that the ordinary daily routine, the average routine?

A. When I was in the office that was about the hours I was there.

X Q. And that was about your daily routine from September, 1927, to June 1, 1928?

A. Yes, I should say so.

X Q. Have you not already testified that your contribution, your chief contribution, to the joint ventures of Palmer & Company, yourself, prior to June 1, 1928, were in the selection of the securities to be traded in?

A. I am sorry, I did not hear the last part of your question.

X Q. Have you not testified already that your chief contribution, or one of your contributions to the joint ven-

tures of yourself and Palmer & Company prior to June, 1928, was in the selection of the securities to be traded in on this joint account?

A. Yes, sir.

Mr. Curley: Now, I ask the Court that from the testimony now before you, that from September, 1927, to June 1, 1928, this witness, as a matter of daily routine, spent the hours from 10 to 12 and from 2 to 3 with Palmer & Company, having to do with the activities necessary to their joint venture——

The Court: No. I do not so understand the testimony, and suppose I were to lose a job, whatever it might be, and I were to go up here and say to Laird & Company: [fol. 98] Can not you let me have a little corner in your office, I want to sit around here; I just want to see if I can not make a few dollars dealing in stocks. All right. They gave me a room. I do not know whether he paid rent for the office or whether he did not. I do not even know that yet; but if I spend all my time, not as a joint venture but in dealing in stocks on the Stock Exchange or curb, or elsewhere, it is purely speculative. I am fortunate or unfortunate, whichever the case may be; but I would not call that a return for services.

Mr. Curley: Would your Honor count this as a qualifying circumstance—supposing the facts were that you would not physically have been able to attend at Laird & Company, and to have made any money, if you did make any money out of your attendance there, if you had not been discharged——

The Court: My difficulty is it is a fundamental one as there is not a return for services; that he invested in the one case and speculated with his money. Now then, so far as I know, he got no return whatsoever for the exercise of his judgment for the benefit of other people. Now then, the term "joint venture" has been used, but I do not understand if you and I and Mr. Finger say we have understood that X stock, for instance, is due for a rise, and we say, all right, we will put in five dollars apiece. Now then, we will share the profits or losses according to our investments, regardless of whom the information came from. Now then, as I understand it, that is exactly what he did. Now then, the fact that he might not have done it, I think is immaterial, because as I understand it, it is

solely capital investment or speculation, and not a rendering of services in the legal contemplation, for which [fol. 99] return is received in diminution of damages by way of unpaid salary or on account of unpaid salary.

Mr. Curley: I see what is in your Honor's mind. I have only one suggestion about qualifying this thing and I am through. Say I am a discharged employee. It so happens after I am discharged I have got a modest capital. I may earn a living thereafter by using that capital in buying real estate, erecting houses upon that real estate, in the hope that I may be able to sell those houses to various purchasers for a price that will net me a margin over and above my cost of land and erection. That is one line of activity in which I may use my modest capital. Another line of activity is I may conclude there is nothing in this building business, and the stock prices are going up for the next year, so I shall spend my time and give my thought and employ my capital not in building operations to make money that way, but in following the lines of the stock market. In either line, whichever line of activity I follow, I put my time or the substantial portion of my time. Therefore, following either line, I am reducing the damages I have suffered by my discharge. I have no right to sit by and say—these damages can only be reduced, the damages following my discharge can only be reduced by reason of salary or wages earned by me in some employment. I do not understand that to be the rule. I have suffered prima facie damage by loss of salary for the remainder of my term; and as I understand the law, that amount is to be reduced by whatever I earn or reasonably should have earned, without respect to the occupation that I followed, or without respect to the way I have spent my time thereafter, so long as I come out dollars so much ahead or dollars so much shy.

[fol. 100] The Court: I get your thought; but is not there a collateral proposition involved here, namely, that if an opportunity arises by which the law requires me to minimize the damages, I am bound to take it, and then it occurs to me your proposition is this: if a man is thrown out of a job, he has to speculate in the stock market to minimize the damages.

Mr. Curley: In that activity or any other line, and if he has followed that activity; but the point I make is this,

that the man prima facie is damaged so much. If during this period of prospect of employment which he has not been allowed to serve, if during that employment by the application of his mental and physical qualities he has earned so much money, now then, that reduces the amount of damage which has flown to him by reason of that discharge.

The Court: I have your point, but it happens we differ, and the question, if there is a question pending, the objection to the question will be sustained, and exception granted. If you find any authority during the noon recess which you think will be persuasive, I shall be glad to see it after luncheon.

Mr. Curley: To avoid useless questions, I understand your Honor has already ruled——

The Court: That any return he may have made prior to June 1st of this year by reason of his happening to have an office at Palmer & Company, was a return on his capital and not a return for services.

Mr. Curley: You have not made any similar ruling with respect to the period since June 1st?

[fol. 101] The Court: No. I do not know what that relationship is.

Mr. Curley: May I ask one more question?

By Mr. Curley:

X Q. What arrangement, if any, did you have with Palmer & Company, prior to June 1st, of this year?

Mr. Finger: I object unless it is made material. The question as it now stands, it does not appear that it has any bearing on the case.

The Court: This is cross-examination, I think, to find out. I think this question is properly put because it may develop there was an arrangement where there was a return for services and not a capital return.

A. The arrangement that I had with Palmer & Company was one I sought myself largely with the idea of rehabilitating myself in the business world. I had an office or desk with them for which I paid no rent, and I had no salary. I traded in securities on the stock exchange for a while, and then we had an agreement that I should buy, employing my judgment, certain securities which would be

re-sold and the profit or loss would be charged against our joint capital, all expenses first being deducted. The return, if the profit did result, was to be divided equally. It was the arrangement. It was all covered on a half sheet of typewriting.

By the Court:

Q. Did you receive any increased profit over and above the proportion of the total investment represented by your capital investment, or pledged; in other words, those who participated with you in the speculative venture, did they pay you anything for your services?

[fol. 102] A. Not as I understand it. The division of profits, if profits resulted—if no profits resulted, there was nothing to divide. There was no compensation to me in the form of salary for services rendered; so that had the thing shown a loss, I still would have drawn a salary—that was not the case. I would not have received any compensation if the expenses of the business including any losses which might have resulted——

Q. Suppose you bought a thousand shares of Steel for the joint account and it went up thirty points, and you sold it, for instance, say there were three of you in the arrangement; would you receive only one-third of the profits, or would you receive more than one-third of the profits and each of the other two of you less than one-third?

A. There were only two of us in the deal, sir, Palmer & Company and myself, and if profits results, we will say, $10,000 of profit resulted in one month, it was divided on this basis: Out of all the $10,000 profit, there was $1,000 profit paid to me. Then the $9,000 of profit were divided equally between myself and Palmer & Company. Had that resulted in no profit during that month, no compensation of any sort would have been paid to me.

The Court: That opens up a new field.

By Mr. Curley:

X Q. Now, then, what were the profits from those joint operations of yourself and Palmer & Company during the period from September——

The Court: That is too broad. That comes under the ruling heretofore made, but it does seem to me that with that $1,000 illustration which came out of the $10,000, is a payment for services. Now then, I have not worked through my own mind whether that is $500 for services—that is only $500 for his services to Palmer & Company——

[fol. 103] Mr. Curley: And $500 for himself.

The Court: That is his own speculation. I think you have a right to inquire now as to what was the net of those payments, not of the total profits of the venture, but of the amount that he received from the pools before division between himself and Palmer & Company.

Mr. Curley: My thought was in the aggregate, take one-tenth of that.

The Court: I do not know whether it was on a 10 per cent. basis.

Mr. Finger: I wonder if your Honor has grasped the significance of the last statement of the witness that that $1000 per month is not salary, and not earnings, because if there had been no profits, he would not have gotten anything; in other words, that was an arbitrary division of whatever profit there was from the speculative enterprise involving use and risk of capital, so that it cannot be termed salary or earnings from services, because that would have accrued, provided it was treated as an expense of the joint venture and he would be entitled to it in any event for his services.

The Court: Will you tell me, Mr. Finger, what he got that $500 for?

Mr. Finger: It was simply an arbitrary arrangement of the division of the profits from the speculation, and if there had been no profits, he would not have gotten it.

The Court: Why was he getting more than 50 per cent. of the profits—It is only because of the services that he rendered of a peculiar nature.

[fol. 104] Mr. Finger: Is not that an inference which the testimony does not show or justify?

The Court: As I see it, the testimony is that the venture was a joint one. That the stocks selected for speculative purposes were selected by him alone; that when, as a result of the speculation, profits resulted, he first got an arbitrary sum from the fund and then the remaining profit was divided equally between him and Palmer & Company. Now

then, as I see it, my inferences from that would be that that was for his services in making the selection and making the investment. I think then this would follow—that you would have to find over that period as to whether those sums exceeded the losses—I am beginning to get a little complexed there, because I do not know whether that is true or not.

Mr. Finger: I would like to have your Honor to have this further thought in mind: That this thousand dollars per month was not earnings and was not compensation, in salary or for services, because first of all, it was not to be paid in any event; secondly, if he received it at all, it was only as the result of profits from a speculative venture, which involved the use of capital; that he could not have possibly gotten it under any circumstances without putting in his capital and risking it. Further, if the result of that was an increase—that if there had been no profit from this speculation which involved the risk and use of his own capital and there had been no profits, he would not have been paid anything. I do not consider, in my opinion, that the fact that the division was first $1000 and then one-half would——

The Court: That was not on the rate of capital, in keeping with the division of capital invested, was it?

[fol. 105] Mr. Finger: If I understand it, it was just an arbitrary arrangement or division.

The Court: Suppose you and I invest a thousand dollars apiece, and we make $2500. I have selected the stock. I have handled the whole transaction. Now then, if we divide it on a dollar for dollar basis, we get $1250 apiece; but if you say to me—before we go in, or after we have made a profit—you take out $1500 and give me a thousand dollars, what is that for—that is compensation for the exercise of my judgment and time and can not be a return on my investment, because my dollar has not earned any more than yours in that respect. It seems to me this additional sum is for services, and it seems to me the only inquiry is whether for those services he got during that period, let us say from September first, was it, four months, and June first of this year, five more months, in all, nine months—the only question here, as I see it, is whether he got or received during that period of nine months, a sum equal to or in excess of three-quarters of $25,000. If he received more he

stops running when that three-quarters of $25,000 is exhausted and it does not apply to some other period of the contract period. If he received less then the damages, if any, for that period, have not been eliminated, but only partly so.

Mr. Finger: Has your Honor considered this other phase of it, that the thousand dollars per month, if received or earned at all, would be not an earning for services alone or in part, or if in part, but that it was the result of the risk of capital; is the defendant entitled to recoup or deduct from the plaintiff's damages a return of capital or an earning or an income which is the result of a risk of capital?

[fol. 106] The Court: I see that thought, but I do not follow it. It does not appeal to me for this reason: If we were to credit him—I do not know whether he got a thousand dollars a month or not; it was an abstract illustration, was it not, a little while ago a thousand dollars out of $10,000, and I do not know whether he got it weekly or monthly or how, and the evidence is not yet ample; I would agree with your proposition if he were to be charged with the entire thousand dollars which he said he received before there was an even distribution of the remainder; he is to be credited or charged rather only with one-half of that because that is the only portion that he received for his services, as the other was on his invested capital.

Mr. Finger: Was not the thousand dollars also due to his investment, because without it he could not have gotten it?

The Court: I do not understand that. I do not understand that he would have been required under the arrangement to have invested it.

Mr. Finger: He could not get it except out of earnings, and there would not be any earnings except through the risk of his capital.

The Court: But it was the risk of the other person's capital that he got it. He got it out of the profits he made for the other person, and he invested that money and his work in investing it amounted, as it seems to me, to services, although I may be right or wrong.

Mr Finger: Will your Honor give me an exception?

The Court: I think he is entitled to be charged with—defendant is now entitled to prove—you may raise the ques-

[fol. 107] tion as I am not passing upon it finally—I am

sufficiently satisfied that the defendant is entitled to have these damages minimized by $500 per month, if such payments were made. I am using $500 as one-half of the profit made by him, or sum received by him in the abstract illustration given by him, over and above what he would have received had it been a pure capital or investment return.

Mr. Finger: Will your Honor give me an exception?

The Court: Yes.

By Mr. Curley:

X Q. Mr. Montgomery, what was the aggregate of the amounts you received from your investment activities with Palmer & Company prior to June 1st of this year, outside of the equal division between you and that firm, of the profits made from your speculations?

Mr. Finger: Please note an exception to that—I object. I presume it is the same thing.

The Court: The same thing, as I understand it.

Mr. Finger: I ask for an exception.

The Court: Let an exception be noted. You are not concerned with any excess over and above three-quarters—you do not care whether he received $100,000 or $200,000, because that would be inquiring into his private affairs. You are concerned only with whether he made as much as three-quarters of $25,000.

Mr. Curley: No, I say I am not limiting it to that. My idea is this—if at the time of an employee's discharge, a year of his employment yet has to run, and the salary for the unexpired period is $5000, my position is if in the first two months after his discharge, the employee makes, by [fol. 108] reason of his reasonable efforts, or opportunity to make, $15,000, then, he has not been damaged at all. That is, you cannot pro rate what he has made in the first two months against any two months of the portion of the salary for the unexpired period.

The Court: What do you say, Mr. Finger?

Mr. Finger: May I have the question read first?

(Last question repeated as recorded.)

First of all, I object to the form of the question, because it refers to his investment activities where the only testimony is that he was engaged in speculative activities; and

I understand your Honor has ruled that the only line of examination permitted here would be how much he received during the stated period from September, 1926, to June 1st, 1927, how much he received during that period through these $1000 a month payments?

The Court: I am handicapped, because I do not know whether this was distribution on a monthly basis or not, but if I understand Mr. Curley's question, he inquires for just that thing and not for the profits on the entire venture, but only profits containing the sums received for his services.

Mr. Finger: I am not raising any new objection, but I understand this is right in line with your Honor's ruling, and so long as the question is confined to just what your Honor has ruled, I assume that the Court will permit the question to go in, but I want our objection in the record with an exception.

The Court: Yes. If the witness understands the question, it will be limited to that.

[fol. 109] X Q. Do you understand the question? Read it, Mr. Smart.

(Former question repeated as recorded.)

A. I do not understand it.

The Court: I do not believe you are really ready for that, because until we know when they were paid, whether monthly or weekly, how can we really understand it, or the witness made to understand it?

Mr. Curley: I will withdraw that question for a moment.

X Q. Mr. Montgomery, during this period prior to June 1st, 1928, how often were the profits made from these joint accounts of yourself and Palmer & Company divided between you with the result that you received more of those profits than did Palmer & Company?

Mr. Finger: I object. That is what your Honor has passed on.

Mr. Curley: I am asking now what his Honor suggested that we should know—how often this was done.

Mr. Finger: As I understand the question, it refers not only to the time up to June 1st, 1928——

Mr. Curley: I said prior to June, 1928.

Mr. Finger: Prior—all right. I ask for an exception.

A. Distribution was made only once.

X Q. Only once during the period prior to June 1st, 1928?

A. Yes, sir.

X Q. Now, then, what amount did you receive on that one occasion over and above and outside the amount of [fol. 110] profits which were divided between yourself and Palmer & Company?

Mr. Finger: I desire merely to be sure that the witness understands what the question is directed to.

Mr. Curley: If the witness does not, he can say so, and I will be glad to restate it.

The Witness: The question is not entirely clear to me.

The Court: You withdraw the question.

X Q. I am referring now in my question to that portion of the profits from the joint accounts of yourself and Palmer & Company, which you yourself received, and of which Palmer & Company received nothing; is that clear to you?

The Court: The amount, as understand it that you are asking for, is the amount that bears the same relation to the total profit made from the joint venture, that the $1,000 used by him a moment ago as an illustration bore to the $1[illegible]000 or the total profit in the abstract transaction re[illegible]to by him.

Mr. Curley: Yes. I will put a question along the lines suggested by your Honor.

Mr. Finger: I am wondering if the witness understands that it is how much he was to receive before Palmer & Company participated.

Mr. Curley: This is cross-examination.

The Court: I think so; and while I do not think there is any mystery about it, I think it is only the question of getting the thing clear as to how much he received before there was an equal distribution of the remainder between him and Palmer & Company.

[fol. 111] Mr. Curley: I withdraw the question.

X Q. You have testified, as I understand it, that the profits of the joint account of yourself and Palmer & Com-

pany, prior to June 1st, 1928, first had a certain amount deducted from them, before the balance was equally divided between you and Palmer & Company?

A. That is right.

X Q. I have understood you further to testify there was but one occasion prior to June 1st, 1928, when those profits were so treated, in the joint operations of yourself and Palmer & Company?

A. That is true.

X Q. Now, I ask you to tell me what was the total of that amount which was deducted from these joint profits and received by you prior to the distribution of the balance in equal shares between you and Palmer & Company?

A. It was equivalent to $1000 a month.

Mr. Finger: Objection.

The Court: Same ruling.

Mr. Finger: I ask an exception be noted for the record.

The Court: Equivalent to a thousand dollars a month.

X Q. It was equivalent to a thousand dollars a month.

The Court: For the period from September 1st to June 1st.

By Mr. Curley:

X Q. From September 1, 1927, to June 1, 1928?

A. Yes.

The Court: What I want to get at is, whether that was the aggregate taken out before the distribution began, so [fol. 112] that I would have to take half of it, if I conclude on my present theory, as I understand it.

Mr. Curley: The question was what amount was received by him.

The Court: Yes.

X Q. Do I understand your answer to mean that the amount actually deducted from the joint profits before the balance was divided between you and Palmer & Company amounted to $1000 a month; is that what you meant?

A. That is what I meant, yes.

The Court: Yes.

Mr. Curley: On your Honor's theory there, which I am not prepared to say——

The Court: Yes.

X Q. Another question, Mr. Montgomery: In this joint account activity between you and Palmer & Company prior to June 1st, 1928, when stocks were purchased for this joint account, was the cost of that purchase borne equally by yourself and by Palmer & Company?

Mr. Finger: I object. It is immaterial under your Honor's ruling.

The Court: I have assumed it was borne equal, because until—because I have assumed that he was entitled to fifty-fifty return on the capital invested or risked or ventured. I think that is a proper question.

Mr. Finger: Exception.

The Court: Yes.

[fol. 113] A. We had an equal risk of capital there.

X Q. My question is not confined to equal risk of capital, Mr. Montgomery. My question was who contributed the capital necessary for the acquisition of stocks when stocks were purchased for this joint account?

A. Both of us.

X Q. Each contributed in equal shares the capital necessary for the acquisition of those stocks?

A. Yes.

The Court: I do not know whether the witness means that in each instance they merely put up a large amount or whether the understanding was it was an equal risk of capital, because if you and I were——

Mr. Curley: My question was in what proportion they contributed this capital necessary for the acquisition of the stocks.

The Court: You understood it that way, didn't you—he is asking you not the capital risked, but the capital contribution, whether that was equal.

A. We contributed—I had a certain amount of capital that was deposited with the firm, and that amount was, as far as I recall it, at all times sufficient to make up one-half of the amount necessary for the operations.

X Q. As a matter of fact, these securities were purchased outright or on margin?

A. They were purchased and went into the joint account of the firm. Banks loaned money on them. They were eventually margin, just as all banking houses and stock

exchange houses eventually borrow money on their securities, they do not keep them in their box.

[fol. 114] X Q. That is, Palmer & Company carried them as they would any other margin account?

A. Yes, I should say so.

X Q. And as I understand, the amount of capital stock to furnish the margin which would be had, incident to the carrying of marginal accounts, was contributed in equal shares by yourself and Palmer & Company?

A. Yes, without looking at the books that would certainly be my impression.

Q. And I further understand that in all purchases of such stocks that a marginal portion of the price was actually paid?

A. Well, I do not know that that would be the correct description of it. The securities were purchased and they were put into a general fund, and sometimes they were the kind of securities on which we could make loans at the bank; sometimes they were the kind of securities which we carried in our own box, because they were not acceptable as collateral; but they were not segregated particularly and a separate loan made upon them.

X Q. On some of those occasions were those stocks purchased, those securities purchased and carried on the credit of Palmer & Company alone?

A. No, I do not think so.

X Q. You would say not?

A. I would say not.

X Q. Mr. Montgomery, subsequent to June, 1928, I have understood you to testify that you had received simply the return on invested capital, on your invested capital in the partnership?

A. After June 1st?

X Q. Yes. Since June 1st of this year?

A. I have received—I have capital invested in the firm, and I have received my interest as a partner.

[fol. 115] X Q. And you have received your interest you say as a partner; you mean by that, the interest on this invested capital?

A. The invested capital in the activities of the firm.

X Q. What amount have you received since June 1, 1928,

from the activities of this firm, apart from any return on the capital you have got invested in the firm?

A. I could not tell you.

Mr. Finger: Did you hear the last part of the question?

The Witness: I do not know that I did.

X Q. I asked you since June 1, 1928, what amount have you received from the activities of this partnership apart from any amount you may have received as a return on your invested capital therein?

A. I do not believe I can answer that; I do not believe I know.

X Q. Well, you are a partner?

A. Yes.

X Q. You are familiar with the partnership business?

The Court: Can you tell me this?

By the Court:

Q. What are the duties of the partners, and what are your duties as a partner particularly?

A. Well, my work is very general. I look into underwritings which the firm is considering. I bring in some customers who trade in stocks, commission business, I look after the routine of the business to some extent.

Q. May I make this inquiry: Do all the partners contribute their services as well as their funds, their capital to the joint venture?

[fol. 116] A. They do, yes, sir.

Q. I see. But in the distribution of profits, that distribution is based solely on the capital invested, or are some of the partners graded at a greater personal value than others?

A. You mean generally, or in my firm?

Q. In your firm only.

A. The arrangement there is, each partner receives approximately the same amount of profits from the firm.

Q. Regardless of his investment?

A. Regardless of his investment.

The Court: I see.

By Mr. Curley:

X Q. Mr. Montgomery, do you know whether your firm's activities have netted moneys to the firm or have lost moneys to the firm, since June of this year?

Mr. Finger: I object. I think the former ruling of your Honor still applies, that the only thing we are interested in is salary or income from earnings and not returns from capital invested or risked.

The Court: I am going to ask you to help me after luncheon. I do not know the answer to it, Mr. Curley.

Mr. Curley: The witness has already testified in answer to your Honor's question, that since June 1st of this year——

The Court: How shall we segregate it?

Mr. Curley: Segregate which?

The Court: The capital returns.

Mr. Curley: I understood that your Honor's ruling already made was that the return to him, the capital in- [fol. 117] vestment, that your Honor would not consider as earnings for the purpose of reducing the damages he otherwise might be entitled to recover in this case. I am going on that basis.

The Court: So am I.

Mr. Curley: I am directing your attention solely and only to his return——

The Court: I get your point, but I think I have not made myself clear. He has gotten so much money, so have all the other partners, and my difficulty is to know, in the absence of an agreement by them, or in the absence of some other facts, to be brought out by this witness, how we are going to separate for our purposes here the moneys received by him, assuming that moneys have been received—what portion of the sums so received was for services, and what portion was capital, or return on capital.

Mr. Curley: I propose to distinguish between those. Certainly the witness is the man in the world most concerned in his own business, and I assume that a witness of his intelligence would know what he received on the one, as distinguished from what he received on the other.

The Court: That would have to be brought out, and I do not know whether it can be done here.

Mr. Curley: The only thing I am trying to get at now is—what amount was earned from the activities of this firm, if any, since June of this year.

The Court: I do not believe you ought to ask that unless you cannot get along without it. I do not think people ought to be penalized in coming into court by showing the full scope of his profits, as well as the others. You are entitled to it so far as necessary to establish your defense, but I [fol. 118] think may be you can avoid the human dislike to reveal facts and figures beyond those necessary for the case.

Mr. Curley: I say, your Honor, I would like nothing better. I do not want to ask the witness a single unnecessary question concerning his private business. The only thing that bothers me, is this, in my view of the law, that, to the extent that his services as a partner have resulted in moneys earned by him whether actually paid or not, since June 1st of this year, they are admissible as a reduction of whatever damages this defendant might otherwise be compelled to pay. I do not want to go a single step beyond it, and candidly, I do not see how I can avoid asking the question I have asked.

The Court: I think probably that can be done. Let us consider it after recess, and I think probably it will be easy to avoid requiring the witness to reveal the aggregate profits of his firm. I think we can avoid that, because I do not believe——

Mr. Curley: I would be glad to put it in the personal——

The Court: All you want is to find out whether his return for services—assuming my rulings for a moment to be correct—have equalled what his salary would have been had he remained on the five-year period. That is all you are interested in, is it not?

Mr. Curley: Yes. If the witness said they would be large enough, of course that answer would be all-sufficient. If he said it would be smaller, it would be hardly sufficient——

The Court: That is right.

Mr. Curley: I would be glad to follow any suggestion your Honor has.

[fol. 119] The Court: Except this, I think a court should be a place where all persons who feel aggrieved, should be free to come without being embarrassed by an inquisition into their private affairs above that which is necessary to determine the issues in this particular case, and you as

counsel, would have that same desire undoubtedly, so we are working for the same end. Two-fifteen.

After Recess

The Court: Where were we at the noon recess, Mr. Curley?

Mr. Curley: Read the last question. (The question was repeated as follows: "X Q. Mr. Montgomery, do you know whether your firm's activities have netted moneys to the firm, or have lost moneys to the firm since June of this year?")

The Court: You are going to restrict that now to him, are you not?

Mr. Curley: Yes. The reason for that question was the witness' prior answer to the preceding question that he really did not know what the return was or what had been made or anything of that kind. This is to test him. Now, read the preceding questions and answers. (Record repeated as recorded.) This is a test.

The Court: That answer evidently meant that he could not segregate the personal return from capital return. If he made any profits—still this question does not do any harm. You may answer that question yes or no. (Outstanding question repeated as recorded.)

[fol. 120] Mr. Finger: May I have an understanding that I have an objection to this whole line of questioning, without making an objection each time?

The Court: I understand your objection to be even so broad as this, that his relations with Palmer & Company from September first of last year till now have no pertinency to this case, and that any questions inquiring into that, directly or indirectly, are objected to, and you take an exception before they are answered?

Mr. Finger: Yes, sir.

The Court: It is so understood.

By Mr. Curley:

X Q. Will you answer, Mr. Montgomery?

A. I am sorry, but I have to have the question again. There seems to have been so much discussion of it, that it does not sound to me as if the question could be answered yes or no.

The Court: Maybe I am wrong on that. We will hear it.

(Question repeated as follows: "X Q. Mr. Montgomery, do you know whether your firm's activities have netted moneys to the firm or have lost moneys to the firm since June of this year?")

A. The firm has earned money.
X Q. The firm has earned money?
A. Yes, sir.
X Q. How much money?

Mr. Finger: I object.
The Court: I do not believe that ought to be asked. I will sustain that objection, but in sustaining it, I do not mean to deprive you of the opportunity of establishing how much money the witness has earned.
[fol. 121] Mr. Curley: I withdraw the last question.
The Court: All right.

X Q. Is the portion of the firm's earnings since June 1st of this year to which you are entitled, as much as $25,000?

Mr. Finger: I object on the ground that the question does not take into account the principal and fundamental question of whether there is any return from anything other than the return on invested capital from speculative enterprise.

The Court: Unfortunately this situation has its complexities, and notwithstanding those complexities I have already indicated that even cross-examination should not go into the firm's affairs, to disclose its private affairs, any further than is necessary, without depriving the defendant of his right; but as I understand the witness's answer so far, he has received something. He does receive something, as do all the other partners, for services rendered. It is not a put-up in capital and stay away. It is put in capital and come and work; and the witness has done that, and the return is on a partnership basis and not on a dollar basis, as the witness has already testified. I am epitomizing his testimony, and giving my version, not his language.

Mr. Finger: But the capital investment of each partner is the same.

The Court: He has not testified to that. He has not told me that.

Mr. Finger: I understood his testimony to that effect.

The Court: No. But if that is so, it is not yet in the record, I am quite confident, because I have been looking [fol. 122] to find—my mind has been attuned to a reply or an inquiry as to whether the capital was equal; but I understood the partners draw the same, regardless of the amount of capital that they have invested therein.

Mr. Finger: Should not the question of the fact as to what the relative contributions to capital be shown, in order properly to make the same the basis of this question?

The Court: I think that is true, but this is cross-examination, and I do not suppose Mr. Curley has any objection to following that order, have you, Mr. Curley, because it is only a question of getting at the facts.

Mr. Curley: Of course your Honor realizes the mode of distribution as between those partners may or may not be along the lines of their proportional contributions to the capital of the firm; so I am not necessarily concerned with this question. Counsel has abundant opportunity to bring those things out on re-direct, if he wants to.

The Court: No.

Mr. Curley: I am only concerned now in trying to get what is germane, concretely germane to the issue in this case of what this man has lost. I do not know the gist of counsel's objection. I have asked the question concerning the subject which your Honor has indicated your view is, that it is material and concretely material.

The Court: Read the question.

(Question repeated as follows: "X Q. Is the portion of the firm's earnings since June 1st of this year, to which you are entitled, as much as $25,000?")

[fol. 123] Mr. Curley: I am trying to avoid your Honor's suggestion——

The Court: I get that, Mr. Curley, but I am wondering how, suppose I do not know whether the investment of capital is the same for everybody, then I would not know whether this was a capital return or a service return, and I think in order to make that of value, it would have first to be shown the exact status there. The plaintiff left off

his inquiries at a stage where it looked to me as if he had not been able to minimize his damages. Now then, you have shown that damages were minimized during the past year, September first to June first, because you went into the facts and brought them out. Whether they were minimized $9,000 or $4,500 I do not know yet. I may be wrong about them being minimized at all. I am only giving my impression. Until you get the underlying facts, it seems to me the profits the firm made are immaterial, and I think the examination in chief has put the burden upon you to give such facts as would warrant after June first, the same inference as you have now succeeded in establishing.

Mr. Curley: Your Honor wants me to ascertain the amount he may be entitled to, which is no return on invested capital. My position will be, of course, that there is no distinction between the two, if he has invested so much money, and his investment covers his activities, and earnings along that line.

The Court: It may work out that way eventually, but until we get all the facts about that relationship, I do not see how I can begin to think about it. That is my difficulty.

[fol. 124] By Mr. Curley:

X Q. Mr. Montgomery, what was your contribution to the capital of the firm?

A. The same as all other partners.

Mr. Finger: Wait a minute. What is that?

The Court: The same as all other partners.

X Q. What was it in money?

Mr. Finger: I object.

The Court: I do not believe that is shown yet to be pertinent. It may be afterwards. I sustain the objection now to that without prejudice to your right to renew it at a later time.

X Q. Does your firm of Palmer & Company pay to its partners some amount in the form of a return on their capital invested in the firm, and then along another line, allow the members a drawing account?

A. Only a return on capital invested.

X Q. What is it?

A. Only a return on capital invested; there is no other form.

X Q. What is the percentage of such return on capital invested?

A. It is equal. It depends upon the amount each partner put in the same amount of capital and each of the partners——

X Q. Is the return say, at the rate of 2 per cent or 5 per cent or 10 per cent or just what, this year?

A. I could not answer that without looking at the figures——

The Court: You may stop there. Now then, Mr. Curley, you have gotten these facts, as I understand it, that in this partnership, each partner put in a like amount of capital. [fol. 125] Each partner renders his services and gives his time and services to the partnership business, consequently, I am bound to conclude at the moment—understand I am not deciding anything because when I look at the thing as a whole, it may not seem to me as it does now; but it seems to me, however, that I am bound to conclude that the return from the partnership is both a return for service and a return on investment; consequently, I am further of the opinion that you are entitled now to ask whether his profit for this year has exceeded certain sums, which I overruled previously.

X Q. I repeat the question now, then, Mr. Montgomery, has the share of the profits of your firm since June first of this year—I withdraw that. Has your share of the firm's profits since June first, 1928, been as much as $25,000?

Mr. Finger: I should like to have the grounds of my objection stated. First of all, that takes no account, that question takes no account of the fact that capital is invested or the extent of the fact that the return is from capital, and that assumes that the defendant is entitled to the benefit, by way of mitigation of the results of profits from this speculative enterprise.

The Court: I do not understand that Palmer & Company has (inaudible). I did understand the work until June first was of a speculative enterprise, but I did not under-

stand that the whole business of Palmer & Company is speculative.

Mr. Curley: Members of the New York Stock Exchange, the testimony is.

Mr. Finger: Let us assume for the moment that what I have just said is incorrect. Nevertheless, this question assumes the right to the defendant to have the benefit of [fol. 126] the earnings from capital. Now, certainly, the defendant is not entitled to that.

The Court: Here is the condition that I do not see through at the moment, and maybe you can clarify it for me: It has now been shown, it seems to me, that the damages have been minimized, not only since September first to June first, and also from June first to date. Now then, the question that you are going to put to him probably is, how much in dollars and cents have those damages been minimized, assuming the liability of the defendant? Now, the amount that you have tried to minimize them, and that you have succeeded in minimizing them—that burden is upon you. Now then, when you show they have been minimized somewhere between X and Y dollars, the amount that he has received in all, but you cannot draw a line, mark the division line between X and Y or divide this sum, and I am wondering if that is not under the old doctrine of confusion, and whether you would not be liable for that in your profit.

Mr. Finger: I have reference to a case where there was an action by the plaintiff for wrongful discharge (reading): "Appellant's contention, whatever the plaintiff earned for his personal services rendered for others, should be considered in reducing damages, is not correct. What other income, if any, plaintiff derived from rentals or from buying or selling sheep or from investments, or from business enterprises generally, is a matter into which defendant has no right to inquire."

The Court: That is what has been my ruling all day. Suppose that the burden is on Mr. Curley to show the proper segregation of this income, if he shows there was [fol. 127] income and profit, how is he going to do it? I mean he has got to make all these inquiries to do it. Now, I do not see how there is any escape from finding out the amount invested by each partner and the profits of each partner. That I regret, but I do not see any escape from

it, do you?—unless I am fundamentally wrong, and this ruling is not in conflict with that.

Mr. Finger: Perhaps I do not understand your ruling correctly, but my impression was that your Honor's ruling now is to the contrary; that this Court here denied the right of the plaintiff to inquire into these transactions.

The Court: Those transactions.

Mr. Finger: That is the language of the Court.

The Court: I think the rulings are identical, as I see it, unless I have misunderstood that. That is what he got for his services. Now, all this is an inquiry to ascertain what he did get for his services as a partner of Palmer & Company; not what he got, if we can separate what he got from his capital investments, from what he got for his time that we will have to do; but I do not see yet how we can do that until we inquire as to all the facts about the investment in Palmer & Company, and return on it, and all that.

Mr. Hicks: Could I suggest this to your Honor; It seems to me is it not true that he would not have gotten any return on his capital except for his special services in the statement he has made here; in other words, if he had not done the work as partner, he would not have any return from capital at all.

The Court: I am not going with you that far. I think that is getting, maybe near the old Merchant of Venice doctrine—I do not believe you want that, because it is his [fol. 128] services. Now then, because his services enabled him to get a return on his investments that he would not have otherwise gotten, that is his investment and capital working as well as himself.

Mr. Finger: May I say one other thing and I am through. Mr. Curley made a suggestion a little while ago which indicated an idea of the law, which is different. The cases as far as I can see in the State and Federal Courts seem to be uniform in holding directly that the whole burden of proof respecting the minimizing of damages is on the defendant. We could, if we had chosen, entirely — refrained from asking Mr. Montgomery a single question as to whether he, in fact——

The Court: That was the question I raised this morning, I think, but you did open it up so that I think it is open in cross-examination.

Mr. Finger: The point I wanted to make was on that basis, on that principle, no testimony is properly admissible or entitled to be considered, which is directly towards the question of minimizing damages unless the defendant meets that burden of proving facts from which the Court can say the damages have been minimized; in other words, if the extent of the cross-examination is such, coupled with any other testimony the defendant might have, that it falls short of proving facts from which the Court can find so much is for services, and so much is for return on capital—that the evidence is not entitled to be considered. I want to just leave that thought with the Court as this cross-examination proceeds.

Mr. Curley: I must say that I do not understand now from anything that counsel has said, just what his position [fol. 129] is which he is making clear to the Court. There is one thing absolutely clear. He placed this witness on the stand he had this witness testify in chief concerning the absence of any minimizing of damages during the period of the unexpired term of this alleged contract of employment; and if it is his thought that that is not a legitimate subject of inquiry for me on cross-examination, under that basis, then it is a thought that I absolutely cannot appreciate.

The Court: I see no escape from a full disclosure of all the facts.

Mr. Finger: May we have an exception. The exception previously allowed, I presume applies here.

The Court: Yes.

By Mr. Curley:

X Q. Mr. Montgomery, what amount of capital did you invest, or have you got invested in the firm of Palmer & Company?

A. $80,000.

X Q. $80,000?

A. Yes.

X Q. And that has been since June first of this year?

A. That is right.

X Q. What return has been made you since June first of this year, ear-marked, characterized by your firm as a return on that capital investment, if any such has been made?

A. I have drawn something under $11,000, between $10,000 and $11,000. We, however, have an inventory which has not been liquidated, which might wipe out that profit.

[fol. 130] X Q. Now, you have drawn $10,000 or $11,000 you say, this year?

A. Between ten and eleven thousand dollars. I am referring now to the activities of the firm.

X Q. By that answer, do you mean to have us understand that the amount which the firm has paid you this year as a return on your capital investment and not in any other possible wise, comes to $10,000 or $11,000?

A. Yes, that is correct.

X Q. That is correct?

A. The amount paid to me is between $10,000 and $11,000. There was another equal amount which was paid into additional capital.

X Q. And another additional amount?

A. Yes.

X Q. Which you return back into additional capital?

A. That is correct.

X Q. So that your capital is now $91,000?

A. Approximately.

X Q. Approximately?

A. Yes.

X Q. For what purpose or in what guise or in what character, did the firm pay you this second $11,000?

A. There was no payment, but one $11,000.

X Q. Did I understand you to say you received another $11,000 which you put back into capital?

A. Well, it was not paid to me. It was credited to my capital account.

X Q. It was substantially paid to you? You received the benefit of it?

A. Yes. It has gone into my share of the capital.

X Q. Now then, that was predicable of profits earned this year, was it not?

A. Yes.

[fol. 131] X Q. So that you have received this year then, since June 1st, 1928, to the present, $11,000 on account of profits earned by your firm, over and above the amount which your firm has so far paid you this year, ear-marked as a return on your capital investment?

A. Yes. The total is something like $21,000.

X Q. Now then, what has been your firm's earnings this year, since June 1st, 1928?

Mr. Finger: What was that question?

X Q. What has been his firm's earnings this year since June first?

Mr. Finger: I object. The question is, what is his share, and that is what we are examining into.

The Court: What Mr. Curley is trying to get at is, whether there is some undivided profit still coming to him, or whether there is not. He is entitled to get at it this way, I think, if he wants to.

X Q. Repeat the question. (X Q. Repeated as follows: "Now then, what has been your firm's earnings this year, since June 1st, 1928?")

A. The last statement that I have, December first, the earnings of the firm at that time were $126,974.04. My proportion was $31,743.51; but I am not taking into account at all a most important item of inventory which is not yet liquidated which might wipe out that profit, that is, to that extent, very speculative.

X Q. Do I understand then, Mr. Montgomery—in order to get this thing right—that your portion of the profits earned by the firm since June 1st, 1928, have been about $31,000?

A. If you do not take into account my losses, yes.

X Q. We are going into this, and you will have an opportunity to tell me about that. I want to know this first—I understand then, to repeat that—your portion of the firm's [fol. 132] earnings since June 1st, 1928, has been approximately $31,000?

A. That is correct, but there are losses which must be deducted from that.

X Q. I will be very glad to give you an opportunity to explain that.

The Court: I think that answer is proper. He does not want it to appear that is an unqualified statement.

Mr. Curley: I will be glad to have him explain.

X Q. Is that amount of $31,000 inclusive or exclusive of the $11,000 previously credited to your account?

A. That is inclusive of the amount spoken of.

Mr. Finger: Is that $31,000 or $21,000?
Mr. Curley: $31,000.
Mr. Finger: I thought he said $21,000.
Mr. Curley: Thirty-one, he said.

X Q. Now then, what has been the firm's earnings since December first of this year?

A. I do not know.

X Q. Well, you have really acted as managing director or manager of the offices, have you not, of the firm's business?

A. No. I am a general partner. I am not the managing director of the firm. I am not the senior partner. I am merely a general partner. This month is only fourteen days, or something of the sort, and we do not get returns on our activities so promptly as that.

X Q. May I ask what has been the amount of business—the business of your firm is mainly in the receipt of commissions charged for buying and selling stocks, is it not?

[fol. 133] A. No, that is not the fact.

X. Q. What is the chief business from which the profits of your firm are derived?

A. Principally from underwritings and purchases of blocks of securities, which are later retailed, not as a commission business.

X Q. Your firm is a member of the New York Stock Exchange?

A. Yes, for twenty-nine years.

X Q. Is not its receipts from its activities as a member of the New York Stock Exchange in buying and selling stocks a substantial portion of its income?

A. I did not say it was not substantial, but it is not the greatest part.

X Q. Not the greatest, but it is substantial?

A. Yes.

X Q. What has been the average business of the firm with reference to buying and selling of stocks and receipt of commissions for that service during, so far as to the month of September, with what it was in the preceding months?

A. About the same, I should think.

X Q. What has been the average of the firm's business with reference to its other lines of activity, other than the purchase and sale of stocks?

A. About the same.

X Q. So we would have a right to understand, would we not, that the firm's profits during December would approximately be, as they have been for the one month's period of the period from June first?

A. I would think so, yes, sir.

X Q. You would think so?

A. Yes, sir.

X Q. Now then, from what you know of your business, Mr. Montgomery, as a special partner, you are familiar——

A. Not a special partner.

[fol. 134] X Q. I withdraw that. You are a regular partner?

A. A general partner.

X Q. Equal partner with the others of your firm?

A. That is right.

X Q. And as such as a partner, and with your investment in the firm, you are familiar with the firm's business and the details of its business that is right, is it not?

A. That is right.

X Q. I will ask you to give us your best judgment as to the firm's business, its average business, with reference to the receipt of commissions from purchase and sale of stocks, and with reference to the receipts from these various underwriting activities you mentioned, for the month of January, 1929, as compared with December?

A. I cannot make a prediction of it that would be of any value. I have pointed out or endeavored to, that there is an inventory item in our business that is very important, where, in a widely fluctuating market, profits can be wiped out almost over night, and I think what the prediction of what are the profits of a firm like our own would be next month or next year, would be nothing but a mere guess. I have revealed to you what the profits were for the past five months.

X Q. Your firm expects to continue in business during the next year, does it not?

A. Yes.

X Q. And of course it expects to remain in business next year on the basis that that business will be a profitable one, does it not?

Mr. Finger: I object.

Mr. Curley: I do not see how——

The Court: Go ahead; but what I am wondering is this: It seems to me that your guess or the witness's guess, or mine—what I was wondering here was, while you have [fol. 135] been heading in this direction, is, suppose I were to assume that all this money that he has gotten is at the rate of $5000 a month, and is subject to no contingency, and that that is clear profit, and that he may or may not make that much this month, how can that be extended into the future?—I do not know.

Mr. Curley: Your Honor, if I may suggest now, is indicating one of the difficulties of this kind of action; given an employment contract; given the discharge of the employee; given the term of five years for the contract still to run; given it in this jurisdiction, where the Statute of Limitations would bar that action after three years; there is only one breach in the employment contract. There can be only one action.

The Court: That is all.

Mr. Curley: The party is free under the authorities to bring his action for breach of contract the day after he is fired or can wait until the end of three years; but if he waits until the end of three years, he can then show as a result, at the trial, only conjectural grounds, not positive grounds, for the damages that will be his in the two years yet to come; and yet unquestionably, under all the authorities, he has a right to recover damages for those two years, as well as the three years during which positive clear proof of damages has been put in; and what your Honor has indicated, I think, is the difficulty that is inherent in that class of action, and that is this this class of action. I would think that I would have a right to show the grounds, if any, for conclusion, that the condition which has been going on so far this year, would continue, rather than discon- [fol. 136] tinue, because it is only anybody's best guess, after all, in this thing, as to what the fact will be.

The Court: What the future holds for?

Mr. Curley: What the future holds for.

The Court: Whether for him or any business; you are entitled to show the length of time the firm has been engaged in the business, whether his arrangement or contract with the other partners is one of unlimited duration or

indefinite duration; whether any contemplated change in the nature or character of the business—and the rest, it seems to me, would be pure plain conjecture and probability.

X Q. Mr. Montgomery, how long has been the life of the firm of Palmer & Company, of which you are a partner?

A. I think about twenty-nine years.

X Q. And during that time it has been carrying on the business substantially which it is carrying on now?

A. Yes. Not so actively though.

X Q. More active now than it has been?

A. Yes.

X Q. Does that firm contemplate continuing in business until next year or the year thereafter?

A. So far as I know, it does.

X Q. If it did not have, as an equal partner, you would have knowledge of it, would you not?

A. I do not hear you.

X Q. If they did not have any such intention of continuing next year or the year thereafter, you, as an equal partner in the firm, would have knowledge of that intention, would you not?

A. Not necessarily; I might have.

X Q. As a matter of fact, you have not got any knowledge of any such intention of discontinuing?

[fol. 137] A. I have no knowledge on their part to discontinue or continue; I assume they will continue their business.

X Q. It is the idea of yourself and your other partners that your membership in the firm will continue so long as it is mutually desirable or is terminable on some event; or what is your contractual relation in that regard?

A. I have a partnership agreement which may be terminated upon the desire of the majority of the partners. Personally——

X Q. How many partners are there?

A. Four.

The Court: Four, altogether, including yourself?

The Witness: Four, altogether, including myself. If you ask me what my intention is, I would infinitely prefer to be an executive than to be the partner in the firm risking my capital.

X Q. Has any of the profits of Palmer & Company since June first, 1928, been employed in opening up new offices or new branches of that firm?

A. We have opened several new branches in the past year.

X Q. Well, the expenses of opening those offices, has that been borne out of the profits made by the firm?

A. On the contrary, it has been amortized over a period of years, and it has still to be paid out of future earnings.

X Q. Out of future earnings?

A. Out of future earnings.

X Q. But the expenditures actually made in that regard this year have not reduced the profits which would otherwise be shown to have been made by your firm this year?

[fol. 138] A. To some extent they have reduced the profit, because a certain amount of the cost of expanding the business through the establishment of branches is borne each year over a period of years, and this year, a part of that will be borne; as a matter of fact, I do not think it has been taken out on the books as yet, and would have to come out of the profits which I have just recited to you.

X Q. That expenditure would be reflected in your interest in the enlarged partnership assets, by virtue of this extension?

A. Depending entirely upon the success and wisdom that we have displayed in doing it. It may have been a very great error to open expensive branch offices of this kind in the market, and it might cost us not only profits, but capital.

X Q. But have the branches you have opened this year so far, been successful?

A. I think three out of five have been.

X Q. Three out of five have been?

A. Yes.

X Q. And the expenditures in that regard, I understand, has lessened the amount of profits available for your firm this year?

A. Only to the extent that a certain amount is apportioned each year, and so far that amount has not been taken off from the profits, the gross profits which I disclosed to you a moment ago. From those profits must be deducted the cost of establishing these branches, or the pro rata cost this year, as well as any losses in inventory, which has not been yet liquidated.

X Q. Now, then, during the period, Mr. Montgomery, from January 1st, 1927, to September 1st, 1927, what activities, if any were you engaged in?

A. I was engaged——

The Court: For what?

[fol. 139] X Q. The period from January 1st, 1927, to September 1st, 1927?

The Court: All right.

A. I have already testified to that, I think, when I said I was endeavoring to locate a position as an executive in some position similar to the one that I had held.

X Q. And during that period you were not engaged in any activity out of which profits resulted?

A. I was investing my capital and speculating with it.

X Q. In the same manner?

A. In the same manner.

X Q. As subsequent, as during the period from September, 1927, to June, 1928?

A. Not in the same manner, no. I was then doing it entirely on my own, just as you or others invest their capital. I have always had the problem of investing such capital as I had, and I had the problem during those periods, just as I have my capital invested now in the business, and that is it.

X Q. You testified, did you not, Mr. Montgomery, that you were the person who selected the directors of this defendant?

A. I selected several of the directors and practically all of the Advisory Committee.

X Q. What was the Advisory Committee; were they directors?

A. No. The Advisory Committee was the committee of men who advised the board about their real estate investments.

X Q. How many of the directors were you instrumental in placing in such positions at the beginning?

A. Nine out of eleven.

X Q. Nine out of eleven. Were those nine directors members of the board during the period from September, 1924, to December, 1926?

[fol. 140] Mr. Finger: I object, because this goes into the question of fitness or capacity, which we have elected not to go into. We have merely made out the prima facie case, and this is a cross-examination of something which we did not go into in chief.

The Court: I do not see its pertinency, Mr. Curley?

Mr. Curley: I think that is probably right.

X Q. You stated in answer to your counsel's question this morning, that your duties as president, were to be performed in the City of New York, or the State of New York; I do not know which you said. As a matter of fact, your duties as president were to be performed in any place where those duties took you, were they not?

A. Yes, except that our office was in New York, and it was contemplated that the majority of our investments would be in New York City.

X Q. Referring to the directors' meeting of September 23, 1924, I ask you when was the contract between you and this corporation executed; during that meeting — after that meeting?

Mr. Finger: I object, because it is immaterial.

The Court: It may be, but I can see the point in Mr. Curley's mind, so I think he is entitled to have it of record, so I will overrule the objection and grant you an exception.

A. I do not recall.

X Q. You do not recall?

A. I do not recall. If you mean the signing of the contract, when it was signed, I do not recall whether it was done at that meeting or afterwards.

[fol. 141] Mr. Curley: May it please the Court, I am sorry to anticipate your Honor's ruling by this question, but we desire it in the record——

The Court: All right.

X Q. Mr. Montgomery, as I recollect, you have already testified as to the amount which was deducted from the profits from the joint account of yourself and Palmer & Company in the period prior to June 1st, 1928, and paid to you before the balance was divided between you and Palmer & Company——

Mr. Finger: May I have that question read?

Mr. Curley: This is not a question. This is directing the witness's recollection—read it. (Question repeated as recorded.)

X Q. I now ask you to state the amount which you received prior to June 1st, 1928, from the profits made by the joint account carried on by you and Palmer & Company; that is, exclusive of the amount deducted from those profits to which I have already referred?

Mr. Finger: I object. The Court has already ruled.

The Court: I sustain the objection because I think they establish for themselves the return for their services. The question is whether they were half or whole——

Mr. Curley: I ask that an exception be noted.

The Court: Let an exception be noted.

Mr. Curley: That is all.

The Court: Have you any re-direct?

[fol. 142] Redirect examination.

By Mr. Finger:

R. D. Q. Mr. Montgomery, you have testified that a substantial portion of the earnings of Palmer & Company since June 1st, 1928, were derived from commissions in executing orders for sales of securities. What is the fact as to whether there has been any extraordinary activity since June 1st, 1928, in the dealings in securities on the New York Stock Exchange?

A. We have had the biggest market in the history of the Stock Exchange.

R. D. Q. Is the activity during that period of time usual or unusual?

A. It is very abnormal.

Mr. Finger: That is all.

By the Court:

Q. Is it anyone's guess as to whether it will continue, or do you know whether it will continue?

A. (No reply.)

Q. Are there any facts—I am not inquiring about anything outside of the case, as I know what your answer will

probably be, but could you say anything as to the probabilities of a like market during the next year or the next two years; this would end in December——

Mr. Curley: December 31, 1929.

A. I think we have had an abnormally active market. I think it is generally the opinion that that market is to some extent over. Yesterday was one of the most quiet days we have had in months.

Q. Can you put something on the record upon which I could conclude as to the probabilities of a like market during the next twelve months?

A. I think this market is likely to decline. I think if it does decline, we won't have one-third of the activity we have had in a rising market.

[fol. 143] Q. There is another question—there are two questions: Does part of the business of Palmer & Company include its investments as a firm, or is its income derived solely from underwriting from commissions and the like things, or does it also make investments for its own account?

A. We undertake, as other investment banking houses, to merchandise securities, to bank securities, wholesale and retail. We do not make investments of a permanent character or speculations of any sort. If we do buy something which we cannot sell, it naturally goes into our inventory and might show us a loss as merchandise which we have not sold but we endeavor to turn that over.

Q. That is, in your underwritings, for instance?

A. In our underwriting.

Q. You have said that even though you received $30,000 or $31,000 for six months, that you have one security or an asset which has not been liquidated, which might show a loss more than sufficient to wipe out that amount?

A. I do not refer, sir, to one security. I refer to whatever is on our shelves, whatever is inventoried. We have been through a very severe break in the market in the last two weeks, stocks breaking as much as 100 points or more. During that severe break our inventory, as was the inventory of all other houses, has depreciated. I have not had any data of that depreciation. I do not know what it amounts to, but it was serious.

Q. You do not know whether at the close of business of December 31st next, you will have any profit for the six previous months?

A. I would not be able to say. I think either way would be possible.

The Court: I see.

[fol. 144] Mr. Finger: It might wipe out the entire profit.

The Witness: It might possibly wipe out the entire profit which I have received.

The Court: Have you any facts upon which a probable conclusion could be drawn; that is, you have not any figures? I shall be asked if that is pertinent to say whether you have been able to make anything during this period of seven months or not, and as it is left now, I will note that you have had at least a temporary profit of $31,000 from your investment and your own personal services; and I have got to assume that that will continue unless it is overcome by evidence that it has probably been or will be wiped out.

The Witness: It is reduced from that amount, as there is certainly the loss of inventory, which must be deducted from that $31,000.

By the Court:

Q. Let me get this: Upon what figures was the total profit of $31,000 arrived at—upon the market value of the securities as of November 30th or December 31?

A. Yes, sir.

The Court: I see. All right.

By Mr. Finger:

R. D. Q. And it is with respect to those same securities that this possible wiping out of the profit may occur at the end of the month?

A. It is possible that the profit might be wiped out, and it is possible that our capital might be impaired.

R. D. Q. You have testified that the portion of the profits of the firm come from underwritings; what is the fact as to the experience in the last six months as to the under-

[fol. 145] writing of securities; has it been favorable or an unfavorable market?

A. It has been an extremely favorable market for selling anything. It has been a big, wide, broad market for securities.

R. D. Q. Then has the profit of Palmer & Company during those six months from the underwriting of securities been normally or abnormally large?

A. It has been unusually large.

R. D. Q. This $31,000 that has been referred to, was that amount or any portion of it ear-marked in any respect, or was it simply a distribution of profits around?

A. That amount has not been distributed. I have only received $10,000. That has been assigned—the books show that that would have been the profit on December 1st, had it been distributed. There was no distribution of profit other than the $10,000 that I referred to.

Recross-examination.

By Mr. Curley:

R. X Q. At the present time your firm is solvent and amply able to pay that balance of $21,000, if it cares to, is it not?

A. I cannot hear you.

R. X Q. At the present time your firm is entirely solvent, is it not?

A. Yes.

R. X Q. And it is amply able to pay to any individual partner in cash, the balance of the $21,000 share of profits since June 1st, if such partner desires?

A. I do not know that a profit exists there today. If the inventory were liquidated, that profit might not exist.

R. X Q. You are a partner in this firm; as partner in this firm, have you not any idea of the difference between [fol. 146] that capital today and that inventory on December 1st?

A. I certainly have. And it gives me a good deal of concern.

R. X Q. In what way?

A. Because it is very much lower than it was on December 1st.

R. X Q. This inventory is composed of stock, I suppose?

A. Largely stocks.

R. X Q. And they are New York Stock Exchange stocks?

A. In most cases.

R. X Q. In most cases. They were bought by your firm on their basis of their representing the valuation equivalent to the purchase price, were they not?

Mr. Finger: I object.

The Court: The objection, I think, is well taken. It is not what they were worth, but what you can get for them.

Mr. Curley: There is not any loss unless you have to sell at a low time.

The Court: If you want to get the profits of a particular period, it assumes an abstract dissolution and winding-up. To get the profits for December, if you stop the first day of December and wound up then, that would be one thing; but if you want to carry it up to the end of the year, then you have to assume liquidation, have you not?

Mr. Curley: I think the Court has already suggested that in this condition, if this primary showing, as I may say, of profits during the year, is going to minimize, the people in the world best able to show it have the responsibility of showing it.

[fol. 147] The Court: I am wondering whether it has not been shown, because it is a thing that you can almost take judicial notice, because the papers are full of it, of course, as to the character of the markets, and the change in them recently.

Mr. Curley: On the other hand, sir, we have securities, as we all know, trading certainly on the New York Stock Exchange, which are just as high now and somewhat higher than they were on December 1st, while other securities have had a tremendously big drop, so that you could not take an average of the New York Stock Exchange as that might have no relevancy whatever to a particular stock.

R. X Q. The possibility of this inventory being reduced materially or wiped out, of which you have already spoken, that is the same possibility that exists at all times, is it not?

A. Yes, in this business.

R. X Q. In this kind of business. It was the same possibility that existed prior to June of this year, was it not?

A. Yes; but it does not exist in an executive's position.

R. X Q. And it was the same possibility that existed in July of this year?

A. Not to the same extent. The market is very high now.

R. X Q. And it is the same possibility that existed on the first of December of this year?

A. Not to the same extent.

R. X Q. To a different extent, but the same possibility?

A. Well, the possibility is expressed in degrees. I think it is a greater possibility now than it has been for a long time, many years.

[fol. 148] R. X Q. The difference is altogether in the way of greater or less probability?

A. I mean the possibilities of a loss are greater in a high market. If you acquire an inventory in a high market, you are under a great liability of shrinkage of inventory. If you acquire an inventory in a low market, you might have appreciation. We are in a high market; there is no doubt about that.

R. X Q. And a high market which may well continue?

A. I would not say so.

R. X Q. Well, it may well continue?

A. I have not any opinion on it.

R. X Q. You decline to express an opinion?

Mr. Finger: I object.

The Court: I think that is right.

Mr. Curley: That is all, Mr. Montgomery.

(Witness excused.)

Mr. Finger: If the Court please, we now rest on our prima facie case.

DEFENDANT'S PROOF

The said defendant, to maintain the issues on its part, offered the following evidence, to wit:

Mr. Curley: I want to feel clearly that the Court has in mind the substance of the pleas filed in this case by the defendant. If your Honor tells me that you have, I won't put in any time on it at all.

The Court: If you will enumerate them, tell me, then I can tell you.

[fol. 149] Mr. Curley: I shall not read them seriatim in any event.

The Court: If you will tell me in substance, I will tell you whether I need help on any one of them or not.

Mr. Curley: Without going into them by number, these pleas are these—they set out these facts, they are all argumentative pleas, because the contract was of such an anomalous character that I could not put in any plea that would not be an argumentative plea. It sets out that there was only one way whereby a president of a Delaware corporation could be——

The Court: That is, the contract was invalid, according to the laws of Delaware; secondly, because of the law of the corporation?

Mr. Curley: Second, by reason of the existence in the certificate of incorporation, the organic law, of the provision that all officers and directors should be removable with or without cause in the manner provided by the by-laws; followed by the by-laws themselves, in the case of The Realty Acceptance Corporation; followed by a by-law that in the case of directors they should be removable at any time, with or without cause, by a majority of the vote of the stockholders at a special meeting called for that purpose; and in the case of an officer, that the officer should be removed at any time, with or without cause, by a majority vote of the whole board of directors at a special meeting called for that purpose.

Now, in the case of the Realty Acceptance Corporation, these pleas, they set up the facts that this president was removed on December 2, 1926, by the board of directors, as [fol. 150] president, following in every respect the by-law in that regard, and on December 31, 1926, by action of the stockholders, he was removed as a director of the corporation; and of course unless he was a director, he could not be president of a Delaware corporation, the statute providing that the president shall be chosen from among the directors.

Now, as to the Stuyvesant Corporation, your Honor will recollect the anomalous feature of this company. We allege that the Stuyvesant was the only subsidiary ever operated by the Realty, the defendant, and that in a contract whereby a stockholder of a corporation undertakes that a given person shall be director or an officer of a corporation, without reference to what the future needs or advantages of the corporation may bring forth is illegal

and inoperative and void, The Realty Corporation, being the stockholder of the Stuyvesant.

Again, we allege that the Stuyvesant Corporation, which is a corporation of New York State, that its president, as that of a New York corporation, could only be elected by the vote of the directors, who, of course, in so doing, were bound and charged, as your Honor will know, to use their best judgment for the corporation's interests; that the Stuyvesant Corporation contained no provision in its organic instrument like the Realty Corporation did, but it did have a by-law in the same language as the by-law of the Realty Company, namely, that any officer should be removable at any time by a majority vote of the board of directors of the corporation, and that a director could be removed at any time, with or without cause, by a majority vote of the stockholders at a special meeting.

These pleas set out that on December 7th the Realty Corporation directors deposed him as president on Decem- [fol. 151] ber 7th, and the stockholders deposed him as a director on December 31, 1926. In the case of the Stuyvesant Corporation, the directors removed him as president of the Stuyvesant Corporation on December 7th at a regularly convened meeting, and on December 31, removed him as director, after which, of course, he was not legally entitled to be president, not being a director.

Now then, of course we allege too that both the provision in the certificate of incorporation of the Realty Corporation and the by-laws in this regard, of both the Realty Corporation and The Stuyvesant Corporation, existed prior to and on and ever since the date when this contract was entered into, and prior to the time when the contract was entered into, which were known to the plaintiff, Montgomery, the contractee. Those are the substance of the pleas.

The Court: In short, that the contracts, even if followed, were subject to the condition written in the charter, of which the plaintiff had notice?

Mr. Curley: Of which he had notice.

The Court: That is one way of expressing your contention, maybe not the legal way, but one way?

Mr. Curley: That is the substance of the plea. Now Mr. Spies.

MURRAY R. SPIES

MURRAY R. SPIES was called as a witness on behalf of the defendant and, having been duly sworn, testified as follows:

The Court: Do you mind telling me in just a minute, what you propose to prove? I am wondering whether it is necessary.

[fol. 152] Mr. Curley: There is not anything that will take any time. We propose to offer in evidence the by-laws of the Realty Acceptance Corporation as they existed at the time prior to this contract was entered into, and in what respect it has since changed, showing in essential regards in important particulars, they were the same at the time complained of. We propose to offer in evidence the by-laws of The Stuyvesant Corporation to show the same thing. We propose to offer in evidence the charter of The Stuyvesant Corporation, to show that it was a New York corporation. We propose to offer in evidence the New York law. I think your Honor will probably take judicial notice of State Laws anyway?

The Court: Yes, if called to my attention.

Mr. Curley: We propose to bring to your Honor's attention the New York Statute directing that the president of a New York corporation, such as this, shall be chosen by the directors of the corporation. Now, we will then call your Honor's attention, not in the way of proof, to the minutes of the meeting of December 2d, where the directors of the Realty Corporation removed in pursuance of the by-law in that regard, the president of the Realty Corporation; to the directors' meeting of The Stuyvesant Corporation on December 9, 1926, where those directors removed him as president of that corporation, following their by-law and then to the stockholders' meeting of December 31, 1926, of the Realty Corporation, where the stockholders following the by-law in that regard, removed the plaintiff as a director of the Realty Corporation, and the stockholders meeting of The Stuyvesant Corporation of 31st December, 1926, where the stockholders, following the by-[fol. 153] law, removed the plaintiff as a director of The Stuyvesant Corporation—all prior to December 31, 1926.

Now, the plaintiff's statement on the stand that he was paid all the money that was payable to him under this con-

tract up to December 31, 1926, relieves us from the obligation of showing that he was paid until December 31, 1926.

The Court: The generality of that being qualified by the $10,000?

Mr. Curley: Oh, yes, with respect to the $10,000, we expect to offer a little testimony only orally on the circumstances of the meeting of September 23, 1924, with reference to the latter incident, and as to when the contract in fact was executed. Now then, I think that is all we might prove; with these things in, then it is an argument on the law and the facts. I think chiefly law; and I assume that your Honor would much prefer to have a timely brief, taking up both the facts introduced and the law, so that you would have it all before you and come to a conclusion, rather than have any legal argument here today.

The Court: Outside the minimizing feature, nothing but law, because you do not disagree on the fundamental facts.

Mr. Curley: No.

The Court: So I shall be glad to have the plaintiff file a brief at some time to be fixed. You file a brief in a week or ten days thereafter, and the defendant have an opportunity to reply. All right.

Mr. Curley: I thought that is what you would prefer, and that is why I did not prepare a brief for presentation.

[fol. 154] The Court: Outside of the question whether damages could have been minimized, the basic question is the validity of the contract, that is the basis of the defense anyway?

Mr. Curley: Is there any objection to offering in evidence the by-laws of the Realty Acceptance Corporation as they appear in the minute book?

Mr. Finger: I agree now, subject to our right for examination.

Mr. Curley: The whole book is in evidence.

Mr. Finger: Yes—not the whole book but the portion, I presume.

Mr. Curley: I think the minutes.

Mr. Finger: The whole minute book is not in evidence, but certain minutes.

Mr. Curley: I offer in evidence the by-laws of the Realty Acceptance Corporation, as they are found in the minute book of that corporation, some of the minutes of which have

already been placed in evidence, the by-laws beginning on page 24 of this book.

Mr. Ehlermann: Here is a copy. Could not we file this and it be subject to examination by counsel?

The Court: Why are all these by-laws pertinent; why are not only one or two pertinent?

Mr. Curley: I think that is true, but for all I know, counsel may think that some that I do not think pertinent, have some pertinency?

The Court: Why not you put in that loose copy—offer certain by-laws from that loose copy with leave to the plain-
[fol. 155] tiff to offer such other by-laws as he deems pertinent, unless he files of record everything?

Mr. Finger: That is all right.

Mr. Curley: I understand that without objection this certified copy of the by-laws will be accepted.

The Court: Only such by-laws as you want to put in, you do not want to put all in?

Mr. Hicks: Either party to use such portion in our briefs.

Mr. Curley: Otherwise we would physically have to cut them out.

The Court: In the event of the record going up on appeal, you can eliminate that.

(The Realty Acceptance Corporation by-laws were received in evidence and marked "Defendant's Exhibit No. 1.")

Direct Examination.

By Mr. Curley:

Q. Mr. Spies, you are the secretary of the Realty Acceptance Corporation?

A. Yes, sir.

Q. During what period?

A. I believe it was back in 1924; shortly after its organization.

Q. You were secretary of the corporation at the time of the directors' meeting which authorized the execution of the contract in this case with Mr. Montgomery?

A. I would like to ask—tell me the date.

Q. September 23, 1924?

[fol. 156] A. Yes, sir.

Q. With reference to those by-laws which have just been offered in evidence, I ask you whether they were the by-laws of the Realty Acceptance Corporation, in existence prior to that meeting of September 23, 1924?

A. I would like to see them before I answer.

Mr. Finger: We concede that, subsequent to examination later.

Mr. Curley: Then it is conceded that the by-laws offered in evidence of the Realty Corporation and The Stuyvesant Corporation——

Mr. Finger: Not Stuyvesant.

Mr. Curley: The Realty Acceptance Corporation, were the by-laws existing prior to and on September 23, 1924, and existing at the time of the grievances complained of here in December, 1926.

Mr. Finger: We think that is correct.

Mr. Curley: Where are the by-laws of The Stuyvesant Corporation? Now, Mr. Finger, you can object to its pertinency if you want. I have here the original organization certificate of The Stuyvesant Corporation, which is the way they do the things in New York.

Mr. Finger: I am going to object to the admission of that on the ground of immateriality. The Stuyvesant is not a defendant in this suit, and not a party to the suit, and anything pertaining to the Stuyvesant has no bearing on the case; whether they removed Mr. Montgomery legally or illegally is immaterial; but the fact is they removed him, and we say that for the purpose of showing under the contract since he was obliged to perform his agreement with the Stuyvesant—we show it was not the one because he was removed——

[fol. 157] The Court: I can see the possibility of the pertinency; I say that by reason of Mr. Curley's statement as I understood his statement, that the defendant is sued as a stockholder for permitting the removal of this gentleman as a president of the Stuyvesant Company, so I will admit that and you can then inquire about its pertinency at the final hearing.

Mr. Finger: Will your Honor take notice of the fact that it was not our view that the defendant is being sued as a stockholder of The Stuyvesant Corporation; our position

is that the defendant is being sued under its contract, and that under its contract he performed the duties as president. It happens that under that contract we have certain other views with respect to other things; under that contract he was obliged to perform certain duties with respect to The Stuyvesant Corporation, and the reason that he has not continued to perform them is because——

The Court: I will admit it any way.

Mr. Curley: If I may suggest on the record, alongside of my friend's view just expressed, that it is our view that the only possible legitimate view of the defendant's liability which the plaintiff could have, would be because of the defendant's status as a stockholder of the Stuyvesant Corporation. If its liability is not dependent on that, it never had a liability.

The Court: And that there is a possibility of binding itself as a stockholder, where it could not bind itself to put in and keep in a person for a number of years as president of itself?

Mr. Curley: Yes, I think the record fails to show that I offered this charter of The Stuyvesant Corporation at a [fol. 158] time prior to Mr. Finger's objection.

The Court: I understood it was offered by you.

Mr. Curley: And it is now in evidence?

The Court: And it stands offered by you.

(Received in evidence and marked "Defendant's Exhibit No. 2.")

Mr. Curley: I offer in evidence the by-laws of The Stuyvesant Corporation.

Mr. Finger: I object.

The Court: That will be admitted with the understanding that you will select therefrom such ones as you deem pertinent.

Mr. Finger: Your Honor will note an exception, based on our objection.

(Received in evidence and marked "Defendant's Exhibit No. 3.")

Mr. Curley: Subject to counsel's right of examination, does plaintiff's counsel agree that the by-laws of The Stuyvesant Corporation now in evidence, were in force prior to and on and since September 23, 1924?

Mr. Finger: I believe those by-laws show they were adopted September 23, 1924.

The Court: Then it would be a question of sequence, would it not?

Mr. Finger: Yes, sir, and I suppose the way to determine that is by the hours of the meeting; but I think Mr. Curley and I can file a stipulation setting forth the chronology of [fol. 153] the minutes of the two companies. We will have no difficulty in agreeing on that.

Mr. Curley: That is all, Mr. Spies.

(Witness excused.)

Defendant's Proofs (Continued)

Mr. Curley: May it please the Court, the meeting of the directors of The Stuyvesant Corporation, held on December 9th, 1926, at which Mr. Montgomery was deposed as president, is already in as Plaintiff's Exhibit No. 7.

Now, I offer in evidence the minutes of the special meeting of the stockholders of The Stuyvesant Corporation held on Friday, December 31, 1926, it being at this meeting that the stockholders of The Stuyvesant Corporation removed Mr. Montgomery as a director of that corporation.

Mr. Finger: We object to it, on substantially the same ground, as immaterial; and the Stuyvesant Corporation as a matter of law had already repudiated the contract.

The Court: I have not read your declaration, but on the theory that the stockholder of the defendant here was guilty of an improper act, and was bound to refrain from it—that may be the very basis that underlies what the defense is. It may be admitted and exception is noted.

(Received in evidenced and marked "Defendant's Exhibit No. 4.")

Mr. Curley: I offer in evidence the minutes of the stockholder's meeting of the Realty Acceptance Corporation, held on December 31, 1926.

(Received in evidence and marked "Defendant's Exhibit No. 5.")

[fol. 160] J. BROOKS LEAVITT

J. BROOKS LEAVITT, was called as a witness on behalf of the defendant, and having been duly sworn, testified as follows:

Mr. Finger: I am wondering whether we have in the record our objection to the minutes of December 31, 1926.

The Court: I think you have. If you have not—they were not offered by you, were they?

Mr. Finger: No, sir. By Mr. Curley.

The Court: As a matter of precaution an objection nunc pro tunc may be entered and exception noted.

My rulings on admission are not precluding you from raising questions about it; but it seems to me now, apart from your declaration, I should not be surprised to find the action at that meeting is the crux of the situation, and the best basis, if any exists, of liability. I may be wrong about that so that I won't go into it. I may have appeared to do things as a stockholder that I cannot do as a corporation or director; but if I make a contract with you, Judge Finger, as a stockholder of all the stock of a corporation, and I enter into a contract with you that I will pay you, and that you shall be president of a company for five years at a salary of $25,000 a year, and I will make up any deficiency that it fails to pay you during that time, and then I take such an act as disqualifies you from being the president of that corporation, I may be liable for that act, although I may not be liable under the doctrine of ultra vires as president of my corporation at that time, or of myself during that time; so that I can see one theory, apart from the dec-
[fol. 161] laration, whereby the main liability may rely on the minutes of the Stuyvesant Corporation; however, they are all in for such use as we may think fit.

Direct examination.

By Mr. Curley:

Q. Mr. Leavitt, you reside in New York city?

A. Yes, I do.

Q. And on September 23, 1924, you were a director of the Realty Acceptance Corporation, the defendant?

A. Yes, sir.

Q. Mr. Leavitt, do you recollect the authorizing at that directors' meeting of a certain contract between the Realty Acceptance Corporation and the plaintiff, Mr. Montgomery?

A. I do, yes.

Q. You remember it?

A. I remember it.

Q. I ask you to state if you recollect when that contract was actually executed, whether during that meeting of the directors, or after that meeting of the directors?

Mr. Finger: Just a minute. May I have that.

A. I was not — when it was executed.

Mr. Finger: I object. It is immaterial when it was actually executed.

The Court: Except upon the $10,000 issue. I do not know whether for certain it is pertinent to that. Objection overruled, and exception granted.

The Witness: It had not been executed at the time — of organization was held.

Q. Well, by the meeting of organization, do you mean the meeting of December 23, 1924?

[fol. 162] A. The directors' meeting. The contract had not been executed at that time, that is my recollection.

Q. It was authorized at that meeting?

A. It was authorized at that meeting.

Q. My question, Mr. Leavitt, is whether or not it was executed during the meeting or after the meeting adjourned.

A. It was not executed during the meeting, but after the meeting adjourned.

Q. It was not executed during the meeting, but after the meeting adjourned?

A. That is correct.

Q. I call your attention to the letter following in the minutes of that meeting, dated September 13, 1924, signed by the plaintiff, Mr. Montgomery, and addressed to "My dear Mr. Leavitt." You are the Mr. Leavitt in question?

A. I am.

Q. Do you recollect the occasion when you read that letter to that meeting of directors?

A. I do.

Q. I ask you to state if you recollect whether, following the reading of that letter, there were any expressions or anything said by the directors present?

A. The letter was passed to me in my office before I went into the directors' meeting, with the understanding that it would be read at that time.

Q. Passed by whom?

A. Mr. Montgomery, the plaintiff. I read that letter to the directors, and there was an expression on the part of several directors whom I could not now identify—I mean, cannot recall which ones—of approval.

Q. Approval of what?

A. Approval of the fact that Mr. Montgomery was willing to waive $10,000 of his salary until a dividend had been paid on the common stock.

[fol. 163] The Court: Yo- do not mean to infer from the witness's testimony that the letter was read prior to the authorization of the contract, or at any other time than is indicated by the minutes?

Mr. Curley: No. My prior question to him, sir, concerns solely the time that the contract was, in fact, executed after the meeting.

The Court: Yes, I got that. The letter was read as indicated by the minutes as made, was it not?

Q. Mr. Leavitt, are you familiar with the affairs of the Realty Acceptance Corporation?

A. Reasonably so.

Q. Are you able to state whether a dividend has ever been paid upon its common stock?

A. A dividend has never been paid on the common stock.

Mr. Finger: I object.

The Court: The objection will be overruled without prejudice and an exception noted.

Q. Your answer, Mr. Leavitt, was——

A. A dividend has not been declared on the common stock.

Q. Has never been paid on the common stock?

A. Never.

Q. It has never been either declared or paid?

A. None has ever been declared or paid.

Cross-examination.

By Mr. Finnger:

X Q. Mr. Leavitt, prior to the time when Mr. Montgomery was removed from his official positions in the Realty Acceptance Corporation, and the contract was declared terminated, there had been a controversy between you and Mr. Montgomery, had there not?

[fol. 164] A. Just what do you mean by that?

X Q. Had there not been friction between you and Mr. Montgomery?

A. No more friction than there had been with most directors and the president of the company, I should say.

X Q. By that then I assume that there was friction between other directors and the president and also between you and the president; is that correct?

A. I would say that is criticism, not friction. Our relations seem to be quite cordial.

X Q. They were?

A. They seemed to me so.

X Q. Did not you have a conversation with Mr. Montgomery sometime during the month of May, 1925—were you ever interested in a company known as the Credit Alliance, in any way?

A. I am a director of it.

X Q. During the month of May, 1925, Mr. Montgomery was making a claim upon the Credit Alliance Corporation, of some kind?

A. I think so, and I think he is suing them now.

X Q. And he is suing them?

A. I think so.

X Q. Did you, during the month of May, 1925, while Mr. Montgomery was making this claim on the Credit Alliance Corporation, have a conversation with Mr. Montgomery in New York, with reference to that claim?

A. I did. I do not know when, but I have had a conversation with him.

X Q. And did not you about that time and in that conversation, request Mr. Montgomery to withdraw the claim?

A. I think that is right.

X Q. And did not you tell Mr. Montgomery in that conversation that he could not afford to fight about that claim and that when he refused to withdraw it, did not you tell

[fol. 165] him that you would fight him in his own company, the Realty Acceptance Corporation, and force his retirement from that company, or words to that effect?

A. I did not. Perhaps you would like to give me an opportunity to tell you about it.

X Q. You have that opportunity now?

A. I told Mr. Montgomery that I felt this was an unfair claim, and I was more interested as a director of the Realty Acceptance Corporation, that he should not take that attitude, than I was as a director of the defendant corporation, for I thought it was very poor business for him to do it.

X Q. Did not you also threaten to fight him in his own company?

A. I did not.

X Q. And did not you also tell him then and there that if he did not withdraw the claim, you were going to get him out of the company?

A. I did not. Allow me to add also that our clients had their money invested in this company, and it would be poor business, I told him, to fight Mr. Montgomery, if he was successful in a company in which our clients had upwards of $700,000 invested, and we had a substantial amount of common stock of the company.

X Q. Let us see about that. Subsequent to this conversation, the stockholders of the Realty Acceptance Corporation, for the most part, exchanged their stock of Realty Acceptance for stock of general bonds and shares, did they not?

Mr. Curley: I have not objected hitherto, because I thought it would be easier to get through without taking time in stating objections; but there has been no charge by the witness of criminal action of the directors and stockholders of the corporation.

[fol. 166] The Court: I will hear you, Mr. Finger.

Mr. Finger: It is offered as showing the bias of the witness.

The Court: I assumed that to be the ground. Is this question pertinent to that?

Mr. Finger: That, of course, is a preliminary question, and I just want to cross-examine him a little further and test him on this last statement in which he sought to make it appear to the Court that his interest——

The Court: The objection will be overruled. It seems to me you are getting nearer the border line of cross-examination.

The Witness: What is the question?

(X Q. repeated as follows: "Let us see about that. Subsequent to this conversation, the stockholders of the Realty Acceptance Corporation for the most part, exchanged their stock of Realty Acceptance for stock of general bonds and shares, didn't they?")

The Witness: Yes, they did.

X Q. And did you have anything to do with that?

A. I recommended it.

X Q. You recommended it?

A. My firm recommended it.

X Q. And at that time the exchange was made on the basis of par for par, was it not?

A. A share of preferred for a share of preferred in the new company, and one share of common for two shares of common in the new company.

X Q. And the book value at the time of the Realty Acceptance Corporation stock was up to par, was it not?

A. I am not competent to say.

[fol. 167] Mr. Curley: I am unable to follow entirely counsel's line of questioning with any possible relation to the witness' bias.

The Court: I see what you have in mind, Judge Finger, but I think the objection is very well taken.

X Q. Now, Mr. Leavitt, following this conversation which you admit you had, but in which you deny that you made the threats——

A. I do.

X Q. You wrote a letter to Mr. Montgomery, criticising his management, did not you?

A. I would not be surprised. I could not say whether I did or did not, but I did criticise it to him, and discussed it with him frequently.

X Q. Before that time you never criticised the management, did you?

A. I do not think I ever criticised the management until they had a chance to demonstrate it for about six months.

X Q. And you found the opportunity to criticise it right after this conversation with reference to the Credit Alliance transaction?

A. It may have been after, but it was not because of that transaction,—both companies, my connection with both companies, my official connection with them at about the same time was then I had a chance only to find out about how this business was going.

X Q. Before the meeting at which the resolution declaring the contract terminated—there had been caucuses of the directors before meetings in which you participated, were there not?

A. There were meetings of the directors after the directors' meetings from which Mr. Montgomery was asked to retire whilst we discussed his administration, and we were unanimously of opinion that he should either remove him- [fol. 168] self or come to some compromise by which somebody could run the company more successfully. If you want to call them caucuses, there were meetings held, and Mr. Montgomery withdrew either at request or voluntarily, while that was discussed by the directors.

X Q. About the time the controversy which led to the removal of Mr. Montgomery was going on, either before or shortly after that, you bought the stock of certain directors in the Realty Acceptance Corporation, didn't you?

A. I bought a great deal of stock, some of which belonged to directors, but most of which I think belonged to our clients to whom we felt we owed some obligation.

X Q. Did not you, as a matter of fact, buy the stock of certain directors in connection with this effort to remove Mr. Montgomery?

A. I did not.

X Q. Did you buy any of the stock of any of the directors about that time?

A. Oh, yes, subsequently I bought a good deal of stock of the directors, and a number of other of our clients. Some of those directors—I should think I should state here, if I am permitted to, were sold this stock by us, and were interested in this venture, by us, and by Mr. Montgomery. One of the most important was approached by Mr. Montgomery, and we subsequently sold him the stock without profit. That stock some months afterwards I repurchased.

The Court: Did you buy any of the stock of these directors for this meeting?

The Witness: No, I did not.

X Q. Did you ever talk to any of these directors about buying in all their stock before Mr. Montgomery was removed?

[fol. 169] A. I won't say I did. I was importuned by all sorts of people to buy their stock.

X Q. Then you may have bought the stock of some of these directors about the time this removal took place, or shortly thereafter?

A. I could not say about that. The transfer records should show.

X Q. You won't deny that you had conversations with some of these directors before the actual removal took place, with reference to buying their stock, will you?

A. I was importuned by directors for months to buy their stock. One of the directors invited by Mr. Montgomery, Stephen J. Leonard, asked me to buy his stock shortly after he sat in the directors' meeting, probably not six months after. It was Montgomery's director, invited in by him, he came to me and wanted me to buy back his stock. I was not interested in him. I felt under no obligation to him.

X Q. You did subsequently buy Mr. Leonard's stock?

A. I have got it.

X Q. And also Mr. Stokes?

A. I think so.

X Q. He was a director?

A. I think I was practically the only market for that stock and I bought Mr. Montgomery's stock although I cannot swear to that.

X Q. Were you not the leader of the move to oust Mr. Montgomery, and is not that the reason why it was put up to you to buy up the stock?

A. I would not say I was the leader. The directors were unanimous and insistent, and there were the difficulties of my position of responsibility to some of them, and I was the leader in the enterprise, as you conceive, of the organization of this company, and to whom the directors and the public had been looking to make a market on this [fol. 170] stock, and it was that responsibility that perhaps

impressed upon me the importance of taking the leadership in this business.

X Q. Mr. Leavitt, that is all unnecessary to my question as to whether you did not buy stock of Mr. Stokes. Didn't you also buy the stocks of Mr. Cross, another director?

A. I was the only market for the stock.

X Q. Did you or didn't you?

A. I cannot say.

X Q. You will not deny it?

A. No.

X Q. Did you not, in fact, buy the stock of Mr. Earle, another director?

A. Not at that time. I subsequently bought the stock of Mr. Earle, which I sold to him originally. That was months after I bought Mr. Earle's stock.

X Q. After what?

A. Months after this consolidation, because Mr. Earle went on the board of the new company.

X Q. And you also bought the stock of Mr. Harris, a member of the Advisory Committee?

A. I cannot say. I will say this, that members of the Advisory Committee to this day are importuning me to buy this stock. They have ever since asked me to buy it. I was, but I am not the only market today.

X Q. And there may have been others whose stock you bought?

A. I think I bought Mr. Montgomery's stock for $132,000, which he got as a bonus.

X Q. Now, you did not buy very much stock of members of the Advisory Committee, did you?

A. No. They had very little.

X Q. They had very little; and what little they did have you did not buy?

A. I bought some, I think I bought, I would say I bought the stock of two, possibly.

[fol. 171] X Q. Who were the two?

A. I should say Mr. Elliman. Rowland Elliman, I am not sure I did, and I think I bought some stock of Brown, Wheelock, Harris, Vought & Company. I bought whatever stock offered in the street, because we were the only market for it, but I did not discriminate against anybody, if that is what you are trying to find out, as witness the fact that I bought Mr. Montgomery's shares.

The Court: I am afraid, Mr. Leavitt, that you should confine your answers to direct replies. This is cross-examination, so you cannot volunteer anything.

X Q. So that the stock of the members of the Advisory Committee so far as you can definitely recall now, was confined to the purchase of the Harris stock?

A. I do not remember the Harris stock, and I do not remember Harris, because I do not think Harris was known to me, and he certainly did not buy his stocks from me.

X Q. Outside of the Harris firm, that is the only one you can definitely remember out of the Advisory Committee whose stock you bought?

A. Can you tell me how many had stock?

Mr. Curley: I am still unable to.

The Witness: If you can tell me how many had stock.

Mr. Finger: I want to show he bought a great deal of the stock of the directors.

The Court: I understand your point, but won't you tell me what this Advisory Committee of whom it consisted was it outside the board of directors or like an Executive Committee of the board of directors, unless this happened to [fol. 172] be an Advisory Committee instead of an Executive Committee. Is it referred to in the by-laws or minutes?

Mr. Finger: The Advisory Committee was outside of the board and had no vote at all, and it was merely a committee which acted in an advisory capacity on the merits of certain real estate loans.

The Court: I see; and that appears from the record already made, I presume, somewhere?

Mr. Finger: I think that is to be found.

The Court: Now, then, the immediate question is that referring to the purchase, outside of the Advisory Committee.

The Witness: What is the question?

The Court: The objection will be overruled, it being to show possible bias or activity which was personal, in the removal of the plaintiff, and more accurately expressed, to show the bias of the witness taken then and lasting until now.

The Witness: I think I bought some stock of one of the Ellimans—I should say Rowland Elliman—and some stock from Vought. If I bought Harris' stock, I do not remember,

as I do not know that he had any. The Advisory Committee were not required to take stock.

X Q. Harris and Vought were in the same firm?

A. Very likely I bought it from the firm; I do not know.

X Q. You do, however, definitely remember that you bought the stock of several of the directors, don't you?

A. Yes.

[fol. 173] X Q. As a matter of fact, they are still members of the Advisory Committee who importune you to buy their stock, and whose you did not buy?

A. I only knew one, and I do not remember who that was asked me for a market a few days ago.

Redirect examination.

By Mr. Curley:

R. D. Q. You referred to your firm; what is your firm?

A. Paine, Webber & Company, 25 Broad Street, New York City.

R. D. Q. Its business is stocks and bonds?

A. We do a brokerage and investment banking business.

R. D. Q. And its address?

A. 25 Broad Street, New York City; 82 Tribune Street, Boston, are the two principal offices. I am in the New York office.

(Witness excused.)

Mr. Curley: Defendant rests.

PLAINTIFF'S REBUTTAL PROOFS

The said plaintiff, to maintain the issues on its part, offered the following evidence in rebuttal, to wit:

Mr. Finger: We have some witnesses here who were brought here to combat certain allegations in the pleas respecting incompetency, and I assume that those pleas are now abandoned and it is therefore unnecessary for us to introduce that evidence; is that correct?

The Court: There has been no evidence offered to support the defense, has there?

[fol. 174] Mr. Finger: The pleas therefore fall.

The Court: Is that right?

Mr. Curley: I should think so. I should think that would be so.

Mr. Finger: Now, Mr. Montgomery, will you take the stand.

HENRY G. MONTGOMERY

HENRY G. MONTGOMERY was recalled in rebuttal on behalf of the plaintiff and, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Finger:

Q. Mr. Montgomery, did you hear the testimony of Mr. Leavitt respecting a conversation that took place in May, 1925?

A. I did.

Q. Is Mr. Leavitt's account of that conversation correct?

A. He does not recall it apparently.

Q. Will you state your recollection of what happened at that interview or in that conversation?

Mr. Hicks: Which interview is that?

Q. May, 1925.

A. Mr. Leavitt called upon me and told me that he had just learned of the claim that I had made against the Credit Alliance Corporation; that he had a large investment in that company and that he was a director of it; that he was a director of my company and that he felt that my action was entirely unwarranted in calling upon the Credit Alliance Company to satisfy a claim which I had made. He promptly demanded that I drop that suit and cease to make any effort to collect what, in my opinion, were obviously [fol. 175] my rights in the matter. I told him that I could not permit him to dictate to me in a matter of that sort, and he then told me that if I did not drop the suit that he would proceed to attack me in my own company, and I could not afford it.

By the Court:

Q. What was the amount of the claim you were pressing against his company?

A. About $100,000 or $150,000. Subsequently, within a few days, Mr. Leavitt addressed a letter to me, critizing the company and my management of it, and finding fault generally. From that time on, he arranged meetings with other directors and sought to do just what he said he would do—that was to get me out of the company.

Q. Is your claim against his company a personal one made on a personal claim of your own or for the Realty Company?

A. It was a personal claim of my own.

The Court: I see.

By Mr. Finger:

Q. Before this conversation when Mr. Leavitt made those threats that you have testified about, had Mr. Leavitt ever criticized or found any fault in your management of the company?

A. None whatever. He attended a meeting of the directors a week about before that, and expressed great enthusiasm about the progress of the business, and I had a letter from Mr. Leavitt a few days after his threatened attack upon me, in which he acknowledges that he did show some enthusiasm at this meeting which took place prior to his talk with me, but it was then about figures which had not been fully submitted, and so on, and so on.

Q. And did those attacks of Mr. Leavitt continue until your removal?

[fol. 176] A. They continued until he got control of the voting stock of the company and through purchase of certain stock of the directors was able to control the action of the stockholders and the directors.

Cross-examination.

By Mr. Curley:

X Q. Mr. Montgomery, what became of this claim of yours against this other corporation?

A. The claim is still pending. It has never come up for trial.

X Q. It is still pending. How long has it been pending now from the time it was brought?

A. I think it was brought in May, 1925, in the courts of New York.

The Court: New York City?

The Witness: New York City, I think.

X Q. In May, 1925, and is still pending?

A. I think that is the date it was brought. We have a record of it here. I think it was May, 1925, it might have been 1926.

By the Court:

Q. How far are the Courts behind in the general business of New York, more than two years?

A. So far as I know it has never been postponed.

By Mr. Curley:

X Q. And is it closely approaching the point of trial?

A. Yes, we had some examinations before trial a few days ago.

(Witness excused.)

Mr. Finger: Mr. Rathmore, will you take the stand, please.

[fol. 177] JOEL RATHMORE

JOEL RATHMORE was called as a witness in rebuttal on behalf of the plaintiff and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Finger:

Q. Mr. Rathmore, were you a director of the Realty Acceptance Corporation at one time?

A. I was.

Q. With what company are you now associated?

A. National Surety Company.

Q. National Surety Company of New York?

A. Yes.

Q. And what official position did you hold with that company?

A. Vice-Chairman.

Q. Did you become a director of the Realty Acceptance Corporation about the time of organization?

A. Yes.

Q. How long did you continue to be a director?

A. Until December, 1926.

Q. Do you recall the meeting of directors at which this letter pertaining to the $10,000 was presented and read?

A. Yes, I do.

Q. Before you voted for the execution of that contract, did you know anything about the letter?

A. No, I did not.

Q. After the letter was read, was there any comment made about the letter by any of the directors.

A. I remember no open comment, and I heard the men sitting next to each other, but I think there was no open comment.

Q. Do you recall about the time that the attacks on Mr. Montgomery began?

[fol. 178] Mr. Curley: I object to this question. It is assuming the attacks upon Mr. Montgomery were made by somebody, about which there is no evidence.

The Court: The question is withdrawn?

Mr. Finger: It goes to the question of competency.

The Court: Any questions?

Mr. Curley: No.

(Witness excused.)

The Court: You rest on both sides, or is there another witness?

Mr. Finger: I presume that is all the testimony, there is any occasion for us to offer with the possible exception—that is all.

The Court: Anything further, Mr. Curley?

Mr. Curley: I would like to place on the record at this time a motion, the equivalent of the proper motion to be made, if a jury were sitting hearing the case; as under the instructions of your Honor, the proper motion would be

to request the Court to instruct the jury to return a verdict for the defendant. Now, with a jury not sitting, I presume the equivalent and proper motion would be to ask the Court to return judgment for the defendant, or enter a verdict for the defendant.

The Court: I think that motion would be proper, as I recall the cases, that the Court's verdict be directed for the defendant on the ground of ultra vires, or kindred grounds.

Mr. Curley: Ultra vires or kindred grounds, and unenforcibility of the contracts in question sought to be en-
[fol. 179] forced against the defendant in this case.

The Court: It comes back to the alleged illegality of it for the reasons stated in the pleas?

Mr. Curley: Yes.

The Court: I understand it then. You may, in the event that you have any other motions on either side, embody them in your brief and they will be presented at the time of argument, and the hearing will be postponed until the day of argument for such motions. What time do you want to file briefs, Mr. Finger?

Mr. Finger: I have the trial brief which contains pretty nearly all the law, which I should have in my main brief. I therefore suggest that associate counsel——

Mr. Curley: Learn from Mr. Smart when his record will be available.

The Court: You need not press yourselves for time, because I have matters that are going to take me some little time and the holidays are intervening. If you have your brief in by the 15th of January and Mr. Curley ten days thereafter, in the meantime you know what the issues are very distinctly, and then you can ask for time for argument when you are both ready. I think they had better do that rather than fix the time for argument now, because it will probably only take an hour on a side to argue it.

Mr. Curley: I think I would probably be satisfied to save your Honor the tedium and time which otherwise might be better employed to be consumed at the argument, and leave it entirely to the brief.

[fol. 180] The Court: All right. You can confer with each other about that, and if you come to that agreement I would be satisfied, and if I want the argument I will ask

for it. I understand that one party or the other wants the minute books and wants to withdraw them from evidence. Have you got copies of those entries to substitute for them?

The Clerk: I can have them made.

Mr. Curley: We do not need the Stuyvesant books.

Mr. Finger: It is agreeable to us to permit the other side to withdraw the minute books now, sending in copies of the minutes, either in full, or the pertinent portions, and I think the pertinent portions will be sufficient, and Mr. Curley and I will have no trouble in agreeing on that.

Mr. Curley: Have you a memorandum of all the minutes offered in evidence, and will you have copies made of them?

The Court: Leave is hereby granted upon the application of defendant to withdraw from the record each of the minute books. The minute books or copies of the entries therein to be returned to this court and filed with the clerk not later than ten days from now, the 28th of December. If copies are not here at that time, the books are to be returned then.

(Whereupon at 4:30 P. M. on 18th December, 1928, the hearing was closed.)

[fol. 181] Findings by Court and Verdict—Filed May 1, 1929

By this action of covenant tried to the Court without the intervention of a jury under R. S. Sec. 649, Henry G. Montgomery, the plaintiff, seeks to recover from Realty Acceptance Corporation, the defendant, damages for the breach of its contract under seal, of September 23, 1924, employing plaintiff as its President and as the President of The Stuyvesant Corporation, all of whose capital stock was owned by the defendant, from the date of the contract to December 31, 1929, at a salary from October 1, 1924 to December 31, 1929, at the rate of $25,000 a year, payable in equal monthly instalments. The main breaches alleged are the removal of the plaintiff from the presidency of each corporation by the respective Boards of Directors in December 1926, and the nonpayment of any salary for the years 1927 to 1929, inclusive.

Defendant, a Delaware Corporation, admits the contract and that, prior to its execution, it was authorized by its Board of Directors. It, likewise, admits the ouster and the nonpayment of salary for the three years. It makes no claim that plaintiff was incompetent. It asserts, however, in avoidance of liability, that its by-laws and those of the Stuyvesant Corporation, chartered under the laws of New York both provided, at the time the contract was made, that the President

"shall be chosen annually by the Board of Directors and shall hold his office until his successor shall have been duly chosen and qualified or * * * he * * * shall have been removed in the manner hereinafter provided." and " * * * may be removed, either with or without cause, by the vote of a majority of the whole Board of Directors * * * ";

[fol. 182] that plaintiff's removal by both companies was carried out in strict conformity with the by-laws; that the by-laws were valid and nullified or became by implication a part or condition of the contract; and that the contract was void for the further reason that it was against public policy.

Plaintiff does not deny that the by-laws were in existence at the time the contract was entered into, that they were valid, that he had knowledge thereof, or that the removal proceedings were had in strict conformity therewith. He takes the position, however, that as there was no statutory inhibition against the employment of officers of Delaware or New York corporations for a fixed term, as the by-laws were amendable, Art. X, "by the affirmative vote of a majority of the whole Board of Directors * * * ", and as the making of the contract employing plaintiff for a fixed term was expressly authorized by more than a majority of defendant's Board of Directors, the contract was a pro tanto supersession of the by-laws and must prevail over them.

Many cases deal with the relation of by-laws and contracts under varying circumstances. The Superior Court of New York ruled, in Martino v. Commerce Fire Ins. Co., 15 J. & S. 520, that a contract of employment for a definite time prevailed over a by-law declaring that certain em-

ployees of the class to which plaintiff belonged should hold office during the pleasure of the Board. The Appellate Division of the Supreme Court of that State decided in Reiss v. Usona Shirt Co., 174 A. D. 181, that

"The fact that the by-laws of the defendant as known to the plaintiff, provided that the treasurer should be elected each year and that he could be removed with or without cause by the directors, did not necessarily render such an agreement as was asserted by the plaintiff ultra vires the corporation."

[fol. 183] Cuppy v. Stollwerck Bros., 216 N. Y. 591, 111 N. E. 249, was an action to recover salary due, under a contract of employment, for one year, from which plaintiff was discharged at the end of four months under the authority of a by-law providing "The Board of Directors by a majority vote may * * * remove a director or officer and by like vote fill the vacancy. * * *". The Court held that

"While the by-law empowered the board of directors to remove a director or officer, it did not authorize them to terminate a contract with one whom they had employed for a definite term. The fact that the plaintiff had been elected a director in no way alters the situation. His election as director was in pursuance of his contract of employment. It did not supersede the contract and render his contract which was for a definite term terminable at will. Douglass v. Merchants' Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822, upon which the respondent relies, is plainly distinguishable from this case. In that case one who acted as the secretary of the corporation at an annual salary was not employed for a definite term, and the decision in that case turned upon that fact. Indeed, in Judge Bradley's opinion in that case, it is pointed out that in cases where the employee had been employed under a special contract it has been held that the corporation loses its general power of removal."

In Nelson v. James Nelson & Sons, Limited, (1913) 2 K. B. 471, the facts were that plaintiff was elected Managing Director of the defendant for the term of four years. Before the expiration of that term, the Directors revoked the appointment. The defendant contended that the Article of

Association providing that the Directors might revoke the appointment of any Managing Director appointed by them became by implication a part of the contract and authorized plaintiff's removal. The Court denied this contention saying:

[fol. 184] "Is there any prohibition in the articles against the directors appointing a managing director for a fixed term, provided he remains a director and performs his duty satisfactorily? If there is one it is to be extracted from the words 'and may revoke such appointment.' But I think sufficient meaning is given to these words if they are read 'and may exercise the power of revoking the appointment when the company or directors may legally do so.' * * * Article 85 (b) is, I believe, a very ordinary one in articles, and it would seem greatly to the prejudice of the company if, while they could employ a clerk for a fixed term, they could not offer so important an official as a managing director any security of tenure, but only an appointment at will or pleasure."

If the by-law may not be read into the contract of employment, it would seem to be of no importance that the by-law of the defendant provides for removal "either with or without cause * * *"

The defendant, however, cites many cases to support its contention that where a Board of Directors has power to remove officers at its pleasure, a contract for a definite period is ultra vires and void. But three of these decisions, Wright v. Warren Bros. Co., 204 Fed. 231, Long v. United Savings & Annuity Co., 84 S. E. 1053, and Darrah v. Wheeling Ice & Storage Co., 50 W. V. 417, 40 S. E. 373, were controlled by a statute of West Virginia declaring, "officers and agents so appointed shall hold their places during the pleasure of the board." Van Slyke v. Metropolitan Nat. Bank, 193 N. W. 470, was ruled by the National Banking Law, which expressly provides that any officer of a National Bank may be removed at any time, by the Board of Directors. Llewellyn v. Aberdeen Brewing Co., 65 Wash. 319, 118 Pac. 30, Murray v. MacDougall & Southwick Co., 153 Pac. 317, were governed by a statute of the State of Washington empowering boards of directors to appoint officers, agents and servants and to remove

[fol. 185] them at will. In Fowler v. Great So. Tel. Co., 104 La. 751, 29 So. 371, Hunter v. Sun Mutual Ins. Co., 26 La. Ann. 13, and Walker v. Maas, 132 Atl. 322, (N. J.) affirmed 140 Atl. 286, there was no contract save that arising by inference from the election or appointment, and in the Louisiana cases the Boards of Directors, by whom the plaintiffs were elected, were without power to amend the by-laws, made by the stockholders, providing for tenure of office during the pleasure of the Board. In Auburn Academy v. Strong, 1 Hopk. Ch. 278, the charter expressly empowered the Trustees to appoint teachers and other officers and remove them at will. None of these cases holds, either directly or by analogy, that a by-law, subject to amendment by a majority of the Board, nullifies a contract expressly authorized by the Board.

The contrast, both in character and effect, between a self-imposed limitation of power that may be removed at will, as in the case at bar, and a limitation imposed upon the Board by an authority to which the Board is completely subordinate, as by a general statute laying down a State policy, or by the creative special act or certificate of incorporation, exemplified by all the foregoing cases that have to do with an express contract, is sharp and striking. The remainder of those cases, involving no special contract, were necessarily controlled not by part but by all of the by-laws touching tenure of office. To read into a contract of employment for a definite period, expressly authorized by the Board of Directors, a by-law amendable by a majority of the Board, and thus nullify the contract would sacrifice substance and straightforwardness for form and procedure. Defendant's further contention, that if the contract be upheld at the expense of the by-law, Boards of Directors may by contract of employment for terms of years perpetuate their business policy and deprive succeeding [fol. 186] boards of the power to afford relief, is not convincing. It sticks in the bark, for the evil possibilities suggested have their true foundation not in the supremacy of contract over by-law, but in the futility of a limitation which rests solely upon a by-law amendable by a majority of the board. Were there doubt of the board's power to amend by necessary implication through solemnly authorized, inconsistent acts, the limitation would constitute no barrier to the commission of the suggested acts by a board so disposed for

the board could formally and expressly repeal the by-law containing the limitation and thereupon with all regularity authorize the contracts for terms of years.

I am of the opinion and find that the contract made by the defendant pursuant to the express authority of its Board of Directors, which had express power to amend at will the by-laws of the defendant, modified, in its legal effect, all inconsistent by-laws and prevails over them. See Machen on Corporations § 728.

Nor was the contract one against public policy. It was not tained with fraud. The restraint thereby placed upon the future freedom of action of defendant's Board of Directors cannot be said to have been in fact or principle injurious to the public interest. The term of office therein fixed was neither permanent, unlimited nor for life but, in view of plaintiff's relation to defendant and his familiarity and grasp of its business, was for a reasonable period only. The contract was in conflict with no statute. In West v. Camden, 135 U. S. 507, the agreement was one made personally by a director and stockholder of a corporation that plaintiff should be permanently retained as Vice-president of that Company. It was not an agreement by the corporation itself. Inasmuch as its breach might readily be presumed to result in personal liability for damages, the agreement was of a character to place defendant's personal in- [fol. 187] terest in possible conflict with the best interests of the Corporation and its stockholders and as plaintiff knowingly dealt with defendant with respect to a subject matter touching his fiduciary relation to the stockholders, the contract was manifestly void as against public policy. Such a contract bears, I think, no more than a surface resemblance to the contract between the parties to this action.

By reason of the doctrine which attributes to the owners of a majority of the shares of a corporation a fiduciary relation towards the minority, see Fletcher Cyclopedia Corporations § 3973, the contract in Fabre v. O'Donohue, 185 App. Div. (N. Y.) 779, though made with plaintiff by a majority stockholder of Fabre Corporation, was nevertheless in principle not different from that in West v. Camden.

The remaining cases relied upon to establish a violation of public policy by the contract here in suit require no separate consideration.

A further ground upon which the contract is not even open to the attacks hereinbefore considered is that before the contract with defendant was made, plaintiff had entered into an agreement with The Stuyvesant Corporation to act as its President for the same period of time and for the same salary specified in defendant's agreement. As under the agreement with defendant, plaintiff was employed as President of both Companies and was to receive therefor from defendant the sum of $25,000 a year less any sums paid to plaintiff by Stuyvesant under the contract with it, the contract with defendant was, in effect one by which defendant, in consideration of plaintiff's agreeing to act also as its President without additional compensation, agreed to retain plaintiff as Stuyvesant's President for the term of the contract and to pay him therefor, in the event of Stuyvesant's default, the sum of $25,000 a year. The charter powers of the defendant were sufficiently broad for this purpose and as defendant was acting as a stockholder [fol. 188] and as the sole stockholder of Stuyvesant, its act was unhampered by any by-law, fiduciary relation, or invalidating principle of the law of public policy. In my opinion the contract was valid and I so find.

The defendant takes the position, however, that the contract, even if valid, was subject to the implied condition that the plaintiff should remain a duly qualified Director and shows that pursuant to the authority of the by-laws of the two Companies, he was removed as a Director of each by their respective Boards on December 31, 1926. His salary was paid to the end of 1926. But these facts are of no avail to the defendant. The contract was breached by the defendant while plaintiff was still a Director of each Company. Upon defendant's breach, plaintiff's cause of action was complete and he was under no obligation longer to keep himself qualified for the presidency. 6 R. C. L. 1021, 7 A. & E. (2d Ed.) 151 note. Moreover, the contract contained an implied condition that the defendant would do nothing to defeat the rights of plaintiff under the contract, would do nothing to render his performance thereunder impossible. Yet, defendant, the sole stockholder of The Stuyvesant Corporation, through its representatives, the Directors of Stuyvesant, removed plaintiff's qualification for the presidency of that Corporation by removing him from its Board. That act constituted neither a defense

to the prior breach nor a termination of defendant's liability under the contract. If of any legal effect, it was a further breach of the contract by the defendant. 6 R. C. L. 1020, Machen on Corporations, §§ 1078, 1080.

The contract was not only valid, it was breached by the defendant.

As the contract was valid and as it has been broken by the defendant, the plaintiff is entitled to a judgment for his damages. The measure of damages for the breach is [fol. 189] the contract price unpaid, less the sums, if any, shown in mitigation of damages. American Trading Co. v. Steele, 274 Fed. 774 (C. C. A. 9), American China Development Co. v. Boyd, 148 Fed. 258, Ransome Concrete Machinery Co. v. Moody, 282 Fed. 29 (C. C. A. 2).

The plaintiff diligently endeavored to find like employment, but could not. About September 1, 1927, he and Palmer & Co., a New York brokerage house, invested equal sums of money in a speculative account to be managed by plaintiff. Profits and losses were to be shared equally with the exception that plaintiff was to receive monthly from profits before their distribution, the sum of $1000. This arrangement continued for nine months, during which plaintiff received in that manner from profits, an aggregate of $9000, in excess of the distributive share of Palmer & Co. On June 1, 1928, plaintiff became one of the partners of Palmer & Co. As such he invested in the partnership business the same sum as each of the other partners. He, like they, also gave his time to the partnership. His profits for the five months' period ending December 1, 1928, were $31,743.51. Of this sum between $10,000 and $11,000 was paid. The remainder was paper profit represented by securities owned by the firm. Defendant contends that its prima facie damages should be lessened by the aggregate of the sums of $9000 and $31,743.51 together with at least the one-fifth part of the latter sum as the estimated earnings of plaintiff for December, 1928. Plaintiff, however, takes the position that the salary to which he was entitled was a non-speculative income requiring no capital investment, that since the breach he has been unable to obtain an income of like nature and contends that damages for breach of a salary contract may not be mitigated by profits derived from plaintiff's speculation with his capital, regardless of

[fol. 190] whether such speculation has or has not been under his immediate personal supervision.

I think this contention sound. In re Moran, 299 Fed. 222 (C. C. A. 6); Sutherland on Damages (4th Ed.), p. 2565; Redfield v. Boston Piano & Music Co., 165 N. W. 365; Williams v. Chicago Coal Co., 60 Ill. 149. It applies with particular force to the partnership profits made by risks of capital in which risks defendant did not share. Again, if in some ventures a part of the profits may be properly attributable to the personal service rendered and the remainder to the capital employed therein, it would be difficult, if not impossible, to make such allocation of plaintiff's partnership profits and defendant has not attempted to do so. See Kyle v. Pou, 96 Ga. 166.

Though in the distribution of profits arising from the joint speculative account of plaintiff and Palmer & Co. the former was given a bookkeeping priority over the latter in the sum of $9000, it is clear that the one-half part of that amount arose from plaintiff's speculation with his own capital and that the setting aside for plaintiff from the gross profits was but a practical or bookkeeping way of enabling plaintiff to obtain compensation for his services in the management of the half interest of Palmer & Co., not a separation of profits arising from plaintiff's half interest into those attributable to his personal efforts and those due to his capital. Moreover, it does not appear that plaintiff's speculation could not have been carried on with equal success had the contract not been broken.

But that the other one-half part of the sum of $9000, or $4500, was not a profit flowing immediately from plaintiff's capital is equally clear. Plaintiff received it as compensation for his personal service in managing the half interest of Palmer & Co. in the joint speculative venture. Though [fols. 191-308] it was not salary payable at all events, it was payment for personal services. I think it sufficiently related in character to plaintiff's salary under the contract to enable defendant to obtain the benefit thereof in mitigation of its damages.

On the day the contract was made, plaintiff wrote a letter to one of defendant's officers stating that he deemed it important that every reasonable effort should be made to minimize expenses during the first year and that by reason thereof he was "prepared to leave with the corporation

$10,000 of my first year's salary until such time as the common stockholders shall have received a dividend." As no dividend had been paid by defendant at the time of plaintiff's removal from office, the sum of $10,000 referred to in the letter had not been paid to plaintiff. It has not yet been paid. I find no ground upon which it may longer be withheld. If plaintiff's suggestion was made before the contract was entered into, it did not become a part of the contract and is here without legal effect. If, however, it was made after the contract was concluded, it was but a voluntary suggestion supported by no consideration and of no binding force. Furthermore, had plaintiff's suggestion become a binding part of the contract, it would have been accompanied by the implied condition that plaintiff be allowed to act as defendant's President for the full term of the contract. Upon the breach of this condition by defendant, the $10,000 withheld would have become immediately due and payable.

Having charged myself with respect to the law as herein stated, I find in favor of the plaintiff and against the defendant and assess plaintiff's damages at the sum of $80,500.

(Sgd.) Hugh M. Morris, J.

May 1, 1929.

[fol. 309] Order Settling Bill of Exceptions

And thereafter, counsel for the said defendant did tender this, its bill of exceptions, and did request the Judge of said court in which said cause was tried to authenticate and sign said bill of exceptions according to the form of the statute in such case made and provided, which was done accordingly, at Wilmington, in said district, this sixth day of June, A. D. 1929.

(Sgd.) Hugh M. Morris, J.

In United States District Court

Defendant's Exceptions to Court's Charge—Filed May 10, 1929

1. Defendant excepts to that portion of the Court's charge holding that in this case the only limitation upon

the directors' power to contract for a fixed term of the defendant's president was a self-imposed limitation on their power which limitation was removable at their will.

[fol. 310] 2. Defendant excepts to the Court's charge in that it held that the defendant's directors could legally contract for a fixed term of office for the corporation's president notwithstanding the provisions in evidence of defendant's certificate of incorporation providing for the removability at any time of any officer or director elected or appointed by the stockholders or the directors.

3. Defendant excepts to the Court's charge in that it held as to defendant and as to Stuyvesant Corporation, that a corporation's legally existing by-laws governing the tenure of its officers did not limit the contracting power of the corporation's directors as to such tenure of office.

4. Defendant excepts to the Court's charge in that it held that no principle of public policy would be violated by the enforcement of the defendant's contract in question.

5. Defendant excepts to the Court's charge in that it stated defendant's contention to be that the prima facie damages should be lessened by the aggregate of the sums of $9000 and $31,743.51 together with at least the one-fifth part of the latter sum as the estimated earnings of plaintiff for December, 1928, whereas defendant's said contention also included the prospective earnings of plaintiff during the year 1929 to the end of the contract period, as shown by plaintiff's testimony as to the likelihood of the continuance of his said business during such period.

6. Defendant excepts to the Court's charge in holding that plaintiff's earnings and profits from his business as shown by the evidence, during the period from July 1, 1928, to December 31, 1928, were not to be considered in mitigation of his damages.

[fol. 311] 7. Defendant excepts to the Court's charge in that it disregarded as immaterial in mitigation of plaintiff's damages, his prospective earnings and profits during the year 1929, as shown by the evidence.

8. Defendant excepts to the Court's charge in holding that the defendant rather than the plaintiff had the duty

of distinguishing between return on invested capital and return for services rendered with respect to plaintiff's earnings and profits, knowledge with respect thereto being peculiarly in the plaintiff.

9. Defendant excepts to the Court's charge in that it held that the $10,000 portion of plaintiff's first year salary was on the evidence now due and payable.

10. Defendant excepts to the Court's charge in that it held that the contract between the Realty Acceptance Corporation and the plaintiff provided and contemplated the payment to Montgomery of $25,000 a year as president of The Stuyvesant Corporation. The only covenant in the contract above referred to for payment of salary is a payment of $25,000 per year by the Realty Acceptance Corporation to be diminished by sums paid him as president of a subsidiary, which provision is contrary to the charter of the corporation.

11. Defendant excepts to the Court's refusal to return, or direct the return of a verdict for the defendant.

(Sgd.) Chas. F. Curley, Attorney for Defendant.

[fol. 312] IN UNITED STATES DISTRICT COURT

JUDGMENT

And now, to wit, this first day of May, A. D. 1929, it is considered and adjudged by the court now here, that the said Henry G. Montgomery, plaintiff, do have and recover of and from the said Realty Acceptance Corporation, defendant, the sum of eighty thousand five hundred dollars ($80,500) and his costs in and about this suit expended, and have execution therefor.

Attest:

(Sgd.) H. C. Mahaffy, Jr., Clerk.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 6, 1929

The defendant, Realty Acceptance Corporation, conceiving itself aggrieved by the judgment entered in the above-

entitled cause, May 11, A. D. 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignment of errors filed herein, and it prays that its appeal may be allowed and citation issued directed to the above-named plaintiff, Henry G. Montgomery, commanding him to appear befor- the United States Circuit Court of Appeals for the Third Circuit, to do and receive what may appertain to justice to be done in the premises, and that the transcript of the record, proceedings and papers upon which said judgment was entered be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pennsylvania.

Realty Acceptance Corporation, by (Sgd.) Chas. F. Curley, Its Attorney.

Wilmington, Delaware, June, 6, 1929.

[fol. 313] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed June 6, 1929

And now, to wit, this sixth day of June A. D. 1929, upon reading and considering the foregoing petition for appeal, it is, upon motion of Charles F. Curley, attorney for defendant,

Ordered by the Court that the appeal of the said defendant, prayed for therein, be and hereby is allowed, and the amount of the bond to be entered by the defendant is hereby fixed at the sum of ninety thousand dollars ($90,000), and that said bond shall operate as a supersedeas.

(Sgd.) Hugh M. Morris, J.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 6, 1929

And now, comes Realty Acceptance Corporation, defendant-plaintiff in error, by Charles F. Curley, its attorney, and says that in the record, proceedings and judgment in

the above-stated cause, there is manifest error in the following, to wit:

1. That the Court erred in holding that in this case the only limitation upon the directors' power to contract for a fixed term of the defendant's president was a self-imposed limitation on their power which limitation was removable at their will.

2. That the Court erred in holding that the defendant's directors could legally contract for a fixed term of office for the corporation's president notwithstanding the provisions in evidence of defendant's certificate of incorporation providing for the removability at any time of any offi- [fol. 314] cer or director elected or appointed by the stockholders or the directors.

3. That the Court erred in holding that as to defendant and as to Stuyvesant Corporation, that a corporation's legally existing by-laws governing the tenure of its officers did not limit the contracting power of the corporation's directors as to such tenure of office.

4. That the Court erred in holding that no principle of public policy would be violated by the enforcement of the defendant's contract in question.

5. That the Court erred in holding that the contract in suit was breached by defendant.

6. That the Court erred in holding that the contract was valid as a contract to employ plaintiff as president of The Stuyvesant Corporation.

7. That the Court erred in viewing, stating and holding that defendant's contention to be that the prima facie damages should be lessened by the aggregate of the sums of $9,000 and $31,743.51 together with at least the one-fifth part of the latter sum as the estimated earnings of plaintiff for December, 1928, whereas defendant's said contention also included the prospective earnings of plaintiff during the year 1929 to the end of the contract period, as shown by plaintiff's testimony as to the likelihood of the continuance of his said business during such period.

8. That the Court erred in holding that plaintiff's earnings and profits from his business as shown by the evidence, during the period from July 1, 1928, to December 31, 1928, were not to be considered in mitigation of his damages.

[fol. 315] 9. That the Court erred in disregarding and holding as immaterial in mitigation of plaintiff's damages, his prospective earnings and profits during the year 1929, as shown by the evidence.

10. That the Court erred in holding that the damage sustained by plaintiff was $80,500 when the record shows that the plaintiff was not eligible to the office of president of defendant or of The Stuyvesant Corporation after December 31, 1926.

11. That the Court erred in holding that the plaintiff was entitled to damages measured by his salary under the contract to December 31, 1929, when the record shows that he was not eligible to act as president of defendant or of The Stuyvesant Corporation on and after December 31, 1926.

12. That the Court erred in holding that the defendant rather than the plaintiff had the duty of distinguishing between return on invested capital and return for services rendered with respect to plaintiff's earnings and profits, knowledge with respect thereto being peculiarly in the plaintiff.

13. That the Court erred in holding that the ten thousand dollar ($10,000) portion of plaintiff's first year's salary was on the evidence now due and payable.

14. That the Court erred in refusing to return, or directing the return of a verdict for the defendant.

(Sgd.) Chas. F. Curley, Attorney for Defendant.

[fol. 316] Citation, in usual form, showing service on Robt. H. Richards, filed June 8, 1929, omitted in printing.

[fol. 317] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 28, 1929

Please prepare and certify a transcript of the record and proceedings in the above-entitled cause, for filing in the United States Circuit Court of Appeals for the Third Circuit, Philadelphia, Pennsylvania, including therein the following, viz:

1. Docket entries;
2. Plaintiff's declaration;
3. Defendant's pleas;
4. Plaintiff's replications;
5. Stipulation that defendant's pleas filed to the first, second and fifth counts be considered as filed to the third and fourth counts of declaration;
6. Amendment to plaintiff's replications;
7. Stipulation waiving jury trial;
8. Bill of exceptions, including the findings of the Court and verdict;
9. Defendant's exceptions to Court's charge;
10. Judgment;
11. Petition for appeal, assignment of errors, and order allowing appeal;
12. Citation;
13. This præcipe;
14. Clerk's certificate.

(Sgd.) Chas. F. Curley, Attorney for Defendant-Appellant.

To H. C. Mahaffy, Jr., Clerk U. S. District Court, District of Delaware.

Service of the foregoing præcipe, with copy, accepted this twenty-seventh day of June, A. D. 1929.

(Sgd.) Robt. H. Richards, Attorney for Plaintiff-Appellee.

[fol. 318] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 319] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1929

No. 4216

REALTY ACCEPTANCE CORPORATION, Defendant-Appellant,

v.

HENRY G. MONTGOMERY, Plaintiff-Appellee

On Appeal from the District Court of the United States for the District of Delaware

Before Woolley and Davis, Circuit Judges, and Johnson District Judge

OPINION OF COURT—Filed January 15, 1930

Per CURIAM:

Affirmed on the findings made by Judge Morris and on his reasoning in entering the verdict.

[NOTE.—Petition for rehearing, which stayed mandate, filed and undisposed of by Court during the pendency of matters sought to be reviewed by certiorari. See Opinion, Rec., page 71, lines 11-12.]

[fol. 320] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1929

No. 4216 (List No. 99)

REALTY ACCEPTANCE CORPORATION, Appellant,

v.

HENRY G. MONTGOMERY, Appellee

ORDER VACATING ORDER DISMISSING APPEAL AND REMANDING CAUSE—Filed July 6, 1931

It is hereby ordered that the order of this Court, entered on June 28, 1930, dismissing the appeal in the above-entitled cause and remanding the case to the District Court of the United States for the District of Delaware be, and the same is, hereby vacated.

Philadelphia, July 6, 1931.

(Sgd.) Victor B. Woolley, Circuit Judge.

[fol. 321] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 322] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD AND ADDITION TO RECORD—Filed Nov. 13, 1931

And now, to-wit, this 12th day of November, A. D. 1931, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the above entitled cause that the Clerk of the Supreme Court of the United States in printing the record presented with the petition for certiorari in this cause omit the following:

1. Plaintiff's Exhibits Nos. 1 to 9, both inclusive, and Defendant's Exhibits Nos. 1 to 5, both inclusive, appearing on pages 192 to 308 and on the first fifteen lines on page 309 of the record in Case No. 4216, October Term, 1929 (annexed as an Appendix to the record filed with the petition for certiorari to avoid expense of reprinting and confusion in repaging), as such exhibits are not material or necessary for the consideration of the points now involved or relied upon in this Court.

And it is further stipulated and agreed that the Clerk of the Supreme Court of the United States in printing said record add the following papers in said Case No. 4216, copies of which, certified by the Clerk of the Circuit Court of Appeals for the Third Circuit, are hereto attached and made a part of this stipulation, to-wit:

[fol. 323] 1. Docket entries of the Circuit Court of Appeals;

2. Exceptions to order of March 25, 1930;

3. Petition for rule to show cause;

4. Order allowing petition to be filed, etc.;

5. Stipulation adjourning argument of petition to the March Term, 1931;

6. Order of continuance entered on stipulation;

7. Notice of argument of petition.

It is further stipulated and agreed that all exhibits to the petition for rule to show cause (No. 3, supra), be omitted from the additional matter to be printed as hereinabove

provided, as the said exhibits appear elsewhere in the record.

Chas. F. Audrey, Attorney for Petitioner. Robt. H. Richards, Attorneys for Respondent.

[fol. 324] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1929

No. 4216

REALTY ACCEPTANCE CORPORATION, Appellant,

vs.

HENRY G. MONTGOMERY, Appellee

DOCKET ENTRIES

July	18,	1929.	Notice of Appeal filed.
"	"	"	Appearances of counsel entered.
"	"	"	Præcipe for appearance of Robert H. Richards and Aaron Finger for appellee filed.
"	"	"	Order extending return day of Citation to 7-25-29 filed.
"	23	"	Transcript of Record filed.
"	"	"	Printed copies of Record filed.
Sept.	4	"	Brief for appellant filed.
"	21	"	Transfer to printed calendar.
Oct.	26	"	Brief for appellee filed.
Dec.	9	"	Reply brief for appellant filed.
"	"	"	Order Assigning Hon. Albert W. Johnson for argument filed.
"	"	"	Argued—Coram: Woolley, Davis & Johnson, JJ.
Jan.	15,	1930.	Opinion—Per Curiam filed.
			Order Affirming Decree filed.
Feb.	3	"	Petition for Rehearing filed.
Mar.	5	"	Petition to Remand Case to District Court for taking further evidence filed.
"	"	"	Argued on Petition to Remand, Coram: Woolley, Davis and Johnson, JJ.
"	11	"	Memorandum in support of Motion to Remand Case filed.

Mar. 11, 1930. Memorandum for appellee in opposition to Petition to Remand Case filed.
" 26 " Order Staying Proceeding Pending Petition to District Court filed.
" " " Certified copy of Order Staying Proceedings, etc., to Clerk of District Court.
" " " Copies of order staying proceedings to counsel.
June 26 " Certified copy of Request of District Court to Remand Case to their Court filed.
" 28 " Exceptions to order of March 26, 1930 filed.
" " " Order Dismissing Appeal and Remanding Cast to District Court filed.
" " " Certified Copy of Order Dismissing and Remanding to Clerk of District Court.
Oct. 2 " Petition for Rule to Show Cause filed.
" " " Order Allowing Petition to be filed and argument to be had at October 1930 Term filed.
Jan. 10, 1931. Stipulation to continue case filed.
" 13 " Order to Continue Case to March Term, 1931 filed.
Feb. 16, " Transfer to printed calendar.
Mar. 31 " Argued—Coram: Buffington, Woolley & Davis, JJ.
" " " Notice of Argument of Motion filed.
Apr. 11 " Brief in support of Motion filed.
July 6 " Order Vacating Order of June 28, 1930 Dismissing Appeal filed.
" " " Order Denying Petition for Rehearing filed.
" 23 " Order Staying mandate filed in No. 4506.

[fol. 325] Clerk's certificate to foregoing paper omitted in printing.

[fol. 326] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

EXCEPTIONS TO ORDER OF MARCH 26, 1930—Filed June 28, 1930

The plaintiff-appellee hereby files the following exceptions to the order of this Court Entered March 25, 1930 upon the petition of defendant-appellant:

1. Plaintiff-appellee respectfully excepts to said order upon the ground that as the term of the District Court of the United States for the District of Delaware, at which the judgment appealed from herein was entered, had expired prior to the filing of defendant-appellant's petition upon which said order of this Court of March 25, 1930 was entered, this Court was without authority to permit said petition to the said District Court for its consideration.

2. Plaintiff-appellee further respectfully excepts to said order upon the ground that, the action of this Court in making said order and in thereby permitting said petition to the District Court for its consideration was erroneous, null, and void, and of no effect, inasmuch as the term of the District Court, at which the judgment herein was entered, had long since expired and this Court had no power to remand except to give effect to its own judgments.

3. Plaintiff-appellee further respectfully excepts to said order upon the ground that, the action of this Court in making said order and in thereby permitting said petition to the District Court for its consideration was erroneous, [fol. 327] void, and of no effect, inasmuch as neither this cause, nor the judgment appealed from herein, was remanded by said order to the said District Court, and that the said order did not vest any jurisdiction in the said District Court in the cause.

4. Plaintiff-appellee further respectfully excepts upon the ground that, as matter of law the petition failed to show the exercise of reasonable diligence on the part of the defendant-appellant with respect to the alleged new matter set forth in the petition, so as to warrant the granting of a new trial of the issue as to the quantum of damages by the District Court.

5. Plaintiff-appellee further respectfully excepts upon the ground that the alleged new matter was as matter of law not material to the issue of the cause as to the quantum of damages and therefore afforded no just ground for the making of said order.

6. That the matters set forth in said petition as matter of law and under the authorities did not authorize the making of said order or warrant the District Court in en-

tertaining a motion for a new trial of the issue as to the quantum of damages.

Dated June 27, 1930.

Robert H. Richards, Esq., Aaron Finger, Esq., Carl Ehlermann, Esq., Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 328] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR RULE TO SHOW CAUSE—Filed Oct. 2, 1930

To the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, Henry G. Montgomery, plaintiff-appellee in the above entitled cause, respectfully shows to this Court:

First. This cause involves an appeal from a judgment of the District Court of the United States for the District of Delaware, in the sum of $80,500 in favor of your petitioner and against the defendant, in a suit by plaintiff-appellee to recover damages for wrongful discharge from his employment, as President of defendant-appellant, pursuant to a written five year contract of employment.

Second. The judgment in petitioner's favor was entered in the District Court on May 11, 1929 (R. p. 2) during the March Term 1929 of said Court, and was dated May 1, 1929 (R. p. 2, 312). Thereafter, and on June 6, 1929, defendant appealed to this Court to review said judgment, and the said appeal was heard by this Court at the October [fol. 329] Term 1929, on or about December 1, 1929. Thereafter and on January 15, 1930, this Court filed its opinion affirming the judgment of the District Court, upon the findings of Judge Morris, and upon his reasoning in entering the verdict. Thereafter defendant-appellant filed a petition for rehearing, and on or about the 5th day of March, 1930, defendant-appellant moved this Court for an

order permitting defendant to apply to the said District Court for an order of the said District Court, requesting this Court to remand the cause and the record herein to the said District Court, to the end that said District Court, on defendant's motion, might vacate the said judgment in plaintiff's favor and reopen the cause for the purpose of taking and considering certain newly discovered evidence. The motion, which was opposed by petitioner, resulted in an order entered at the present term of this Court on March 25, 1930, permitting defendant-appellant to "file a petition in the District Court of the United States for the District of Delaware, asking the said District Court, at its option, to request this Court to remand this cause and the record therein, to the said District Court, to the end that it may, if persuaded by the defendant petitioner, vacate the judgment therein and reopen said cause for the purpose of taking and considering said newly discovered evidence bearing solely on the quantum of the judgment." A copy of the order of this Court dated March 25, 1930, is hereto annexed as Exhibit "A".

Third. Thereafter, and on or about the 9th day of April, 1930, defendant-appellant moved in the said District Court, asking said Court to request this Court to remand the cause and the record herein to the said District Court, to the end that that Court might vacate the judgment of May [fol. 330] 1, 1929, and reopen the cause "for the purpose of taking and considering the newly discovered evidence" described in the moving papers. The motion was opposed by your petitioner, and after argument, affidavits in support of and in opposition to the motion were filed by the parties and decision reserved by the Court. On June 23, 1930, the District Court filed an order respectfully requesting this Court to dismiss the appeal of the defendant-appellant, without prejudice, and to remand the cause and the record to the District Court, to the end that said Court might vacate the judgment, and on application of the defendant, reopen said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of said judgment. Upon information and belief, a certified copy of said order of the District Court was filed with the Clerk of this Court on or

about June 25, 1930. A copy of said order of the District Court is hereto annexed as Exhibit "B".

Fourth. Thereafter, and on June 27, 1930, defendant-appellant, applied to this Court pursuant to the terms of the order of the District Court of June 23, 1930, for an order dismissing the appeal without prejudice. The application was opposed by petitioner, and formal exceptions were filed in his behalf to the order of this Court of March 25, 1930 hereinabove referred to, on the grounds, among others, that the order of this Court of March 25, 1930, on which the application to the District Court resulting in its order of June 23, 1930 was based, was null, void and of no effect, inasmuch as the term of the District Court of the United States for the District of Delaware, at which the judgment appealed from was entered, to-wit, the March Term 1929, had expired long prior to the filing of defend-
[fol. 331] ant-appellant's petition, and the entry of this Court's order of March 25, 1930 thereon, and that therefore, the District Court was without jurisdiction to proceed in the cause. A copy of said exceptions is hereto attached as Exhibit "C". On June 28, 1930, over petitioner's objection, this Court, per Circuit Judge Buffington, entered an order dismissing the appeal of defendant-appellant "without prejudice", and remanding the cause to the District Court, pursuant to the request of said District Court, and on application of defendant-appellant. A copy of the order of this Court dated June 28, 1930, is hereto annexed as Exhibit "D".

Fifth. On June 30, 1930, a certified copy of the order of this Court of June 28, 1930, was filed by defendant-appellant with the Clerk of the District Court of the United States for the District of Delaware, and through its counsel, defendant orally applied for and obtained from the District Court of Delaware, an order purporting to vacate and set aside the judgment of May 1, 1929 in favor of your petitioner, against the defendant, and purporting to reopen the cause "for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment." A copy of the said order of the District Court of June 30, 1930, is attached as Exhibit "E". The entry of said order was oppposed by your petitioner, and exceptions to the entry thereof promptly filed in the

District Court. A copy of such exceptions is annexed as Exhibit "F".

Sixth. Upon information and belief, your petitioner respectfully alleges that at the time of the making and entry of said order of the District Court of June 30, 1930, and at the time of the respective applications of defendant-appellant for, and at the time of the entry of, this Court's [fol. 332] orders of March 25, 1930 and June 28, 1930, the said District Court was without jurisdiction to vacate and set aside the said judgment and grant a new trial for the purpose of admitting newly discovered evidence. As hereinabove stated, and as shown by the transcript of record, the said judgment of the District Court dated May 1, 1929, was entered at the March Term 1929, and that term was not extended by order, or otherwise, and expired by operation of law, long prior to the making and entry of said order of June 30, 1930, and long prior to the making and entry of the orders of this Court of March 25, 1930, and June 28, 1930, hereinabove mentioned, and long prior to the respective applications therefor.

Seventh. Your petitioner has appealed to this Court from the order of the District Court of June 30, 1930, aforesaid, upon the ground that the District Court was without jurisdiction to set aside its judgment after the expiration of the March Term 1929, and the appeal therefrom, will be heard at the October Term 1930 of this Court. Inasmuch, however, as the March Term 1929 of this Court has not yet expired, and this Court has still jurisdiction of the cause herein, your petitioner respectfully prays that the order of this Court of June 28, 1930, entered at request of the District Court and on application of defendant-appellant, dismissing defendant-appellant's appeal without prejudice, and remanding the cause to the District Court, in view of the lack of jurisdiction of the District Court to proceed further in the cause, be vacated and set aside and that this Court hand down its mandate affirming the judgment of the District Court, in pursuance of its per curiam opinion of affirmance of January 15, 1930, and for such other relief as may be just in the premises. Your petitioner further alleges that the question of the jurisdiction of the District [fols. 333-342] Court, to grant a new trial herein, has not heretofore been presented to the Judges of this Court who

decided the appeal herein or who granted the application of defendant-appellant for leave to apply to the District Court as aforesaid.

Eighth. In order that the jurisdiction of this Court to consider and decide this motion may not expire pending its hearing and determination, your petitioner respectfully prays for a rule or order to show cause, extending the term of this Court in this cause until the hearing and final determination of this application, and requiring defendant-appellant to show cause at a time to be fixed by the Court why the relief herein prayed for should not be granted. No previous application for the above relief has been applied for by your petitioner.

Dated New York, September 27, 1930.

(Sgd.) Henry G. Montgomery.

Duly sworn to by Henry G. Montgomery. Jurat omitted in printing.

[fol. 343] 1930, October 2.

I have not entertained the motion for a rule to show cause, but allow the motion to be this day filed with direction that it stand over to be brought up and argued before this Court at its next term.

Victor B. Woolley, C. J.

[File endorsement omitted.]

[fol. 344] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

STIPULATION TO CONTINUE—Filed Jan. 10, 1931

It is hereby stipulated and agreed by and between Charles F. Curley, Esq., counsel for the Defendant-Appellant, and Aaron Finger, Esq., counsel for the Plaintiff-Appellee, that, subject to the approval of the Court, argument of the pending motion and petition in this Court

to vacate and set aside the order of this Court of June 28, 1930, in the above entitled cause, which was continued to the present term by order of Hon. Victor B. Woolley, one of the Judges of this Court, dated October 2, 1930, be continued to the next term of this Court.

Chas. F. Curley, Attorneys for Defendant-Appellant. Aaron Finger, Attorneys for Plaintiff-Appellee.

[File endorsement omitted.]

[fol. 345] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Notice of Argument

Sir: Please take notice that the pending motion and petition to vacate and set aside the order of this Court of June 28, 1930, in the above entitled cause, will be brought on for argument before the Court on Tuesday, March 31, 1931, in conjunction with the argument of the appeal of Henry G. Montgomery, plaintiff-appellee, v. Realty Acceptance Corporation, defendant-appellant, No. 4506, October Term 1930.

Dated March 26, 1931.

Yours, etc., R. H. Richards, Aaron Finger, Carl Ehlermann, Attorneys for Henry G. Montgomery, Plaintiff-appellee.

To Charles F. Curley, Esq., Wilmington, Delaware.

[fol. 346] Clerk's certificate to foregoing papers omitted in printing.

[fol. 347] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER FOR CONTINUANCE—Filed Jan. 12, 1931

In conformity with the stipulation of counsel filed,
It is hereby ordered that the above entitled case be continued to the March Term, 1931.
Philadelphia, January 12, 1931.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 348] Clerk's certificate to foregoing paper omitted in printing.

[fol. 349] [File endorsement omitted.]

[fol. 350] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,128. U. S. Circuit Court of Appeals, Third Circuit. Term No. 314. Realty Acceptance Corporation, petitioner, vs. Henry G. Montgomery. Petition for writ of certiorari and exhibit thereto. Filed August 19, 1931. File No. 36,128.

No. 314

October Term, 1934

IN THE

Supreme Court of the United States

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

CHARLES F. OGILBY,
H. RANDOLPH HICKS,
Counsel for Petitioner.

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IN THE

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REALTY ACCEPTANCE CORPORATION,

Petitioner,

v.

HENRY G. MONTGOMERY.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Realty Acceptance Corporation, the defendant in the trial court and hereinafter referred to as the defendant (appellee in the proceeding to which this petition relates), respectfully prays that a writ of certiorari issue to review the judgments or orders of the Circuit Court of ...peals for the Third Circuit entered in the above-entitled ... on July 6, 1931.

STATEMENT OF FACTS.

This petition involves the question of the power of a United States Circuit Court of Appeals in dealing with a case before it on appeal. In the Delaware District Court

Henry G. Montgomery (hereinafter referred to as "plaintiff") sued the defendant at law to recover damages arising from defendant's alleged breach of its contract to employ plaintiff for a term of years as its President. Under a written stipulation the case was there tried to the Court without a Jury. The question as to the enforcibility of the contract and all other legal defenses were determined by the trial court in favor of the plaintiff. Under the principle that the plaintiff's damages were prima facie the contract salary for the balance of the contract term of employment less plaintiff's earnings during such remaining term, plaintiff testified as to his occupation and earnings during such period. Such testimony was the sole testimony as to the quantum of the damages suffered by him and was not controverted by defendant. The trial court entered judgment in favor of the plaintiff for $80,500. Such judgment was entered on May 11, 1929. On June 6, 1929, being at the same term of Court, defendant perfected its appeal to the Court of Appeals for the Third Circuit (Rec. appendix, p. 3). On January 15, 1930, the Court of Appeals handed down a per curiam opinion that the judgment below ought to be affirmed (Rec. appendix, p. 319). While defendant's petition for a rehearing was pending (opinion of Court of Appeals, Rec., p. 71, lines 11-14) (no mandate has yet come down), defendant filed in the Court of Appeals its petition supported by affidavits. Such petition and affidavits set out newly discovered evidence showing that the uncontroverted testimony of the plaintiff in the Court below as to the amounts earned by him during the balance of the contract period of employment was in very material respects incorrect and untrue, and that as a result of such incorrect and untrue testimony he had obtained judgment for a wholly

unwarranted and unjust amount. The petitioner requested leave of the Court of Appeals to ask the District Court to request the Court of Appeals to remand the cause and the record therein to the District Court to the end that it might vacate the said judgment and reopen the said cause for the purpose of taking and considering said newly discovered evidence bearing solely on the quantum of the judgment (Rec., p. 4a). On March 26, 1930, the Court of Appeals entered an order granting such leave and further ordered that all proceedings in the cause then pending in that Court be stayed until after the District Court should have heard and decided the defendant's petition, and if allowed until it should have finally acted upon the matters raised thereby (Rec., p. 5).

Pursuant to such leave, defendant filed its petition supported by affidavits in the District Court. After a full hearing such District Court on June 23, 1930, entered an order that the said Court of Appeals be requested to dismiss the pending appeal without prejudice, and to remand the cause and the record to the District Court, to the end that that Court might vacate the judgment entered therein and on defendant's application reopen the said cause for the purpose of taking and considering the said certain newly discovered evidence bearing solely on the quantum of the said judgment (Rec., p. 52). Such last-mentioned order having been certified to the Court of Appeals, that Court on June 28, 1930, entered an order dismissing defendant's appeal from the said judgment "without prejudice," and remanding the said cause and the record therein to the District Court "to the end that the said District Court may vacate the judgment entered herein and on application of defendant-appellant re-open the said cause for the pur-

pose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (Rec., p. 54). Such order of the Court of Appeals having been certified to the District Court, that Court on June 30, 1930, entered an order setting aside the said judgment and reopening the said cause "for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (Rec., p. 59).

The plaintiff thereupon appealed to the Court of Appeals from the last-mentioned order of the District Court. Before this appeal was heard plaintiff also filed a motion in the Court of Appeals asking that Court to vacate its order of June 28, 1930. Plaintiff's appeal and motion were grounded on the contention that the Court of Appeals, notwithstanding the original cause was then pending in that Court, had no authority to authorize the District Court to open the judgment in the trial court and consider such newly discovered evidence because at the time of making such order the term of the District Court at which such judgment was entered had expired.

On July 6, 1931, the Court of Appeals handed down an opinion (Rec., p. 70) and pursuant to such opinion entered two judgments, one (Rec., p. 76) directing that the order of the District Court of June 30, 1930, vacating the said judgment should be reversed, and the second (Rec., appendix, p. 320) directing that the order of the Court of Appeals of June 28, 1930, dismissing without prejudice the first appeal taken by defendant and remanding the cause to the District Court to the end that that Court might open the judgment and hear the newly discovered evidence solely on the quantum of plaintiff's damages, be vacated. In thus vacating its own order, the Court of Appeals appears to have based its action

on the fact alone that the date of such order was after the expiration of the term of the District Court at which such judgment had been entered. This despite the fact that the District Court in setting aside the judgment was not exercising any power qua District Court but only acting under express authority to it from the Court of Appeals which then had sole control of the cause; and despite the fact that Section 701 Revised Statutes was called to the Court's attention.

(NOTE: The record on the original appeal taken by defendant appears as the "appendix" to the record filed with this petition, to avoid expense of reprinting and confusion in repaging.)

SPECIFICATION OF ERRORS.

Your petitioner insists that the Circuit Court of Appeals erred—

1. In holding that because of the expiration of the term of the District Court at which the judgment was entered it was without power to authorize the District Court to vacate the judgment and reopen the cause to hear and consider certain newly discovered evidence bearing solely on the quantum of plaintiff's damages although an appeal had been seasonably taken and was then pending in the Appellate Court.

2. In holding that its order of June 23, 1930, dismissing defendant's appeal without prejudice and remanding the cause to the District Court to the end that that Court might vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment, should be vacated.

REASONS FOR GRANTING THE WRIT.

The reasons why the writ should issue are:

1. The decision of the Circuit Court of Appeals that it was without power to remand the case with leave to the District Court to vacate the judgment and reopen the cause to hear and consider certain evidence discovered after the expiration of the term at which the judgment was entered is squarely in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in *Angle* v. *United States*, 162 Fed. 264, and of the Circuit Court of Appeals for the Fifth Circuit in *Scott* v. *United States*, 165 Fed. 172, both which cases hold that Federal Courts of Appeal have such power. This conflict should be resolved by a decision of this Court. (Rule 38 (5) (b) U. S. Supreme Court Rules.)

2. The Circuit Court of Appeals in this case has decided a Federal question in a way in conflict with applicable decisions of the Supreme Court, to-wit, the power of a Circuit Court of Appeals in a case before it on appeal to make such order or direct such further proceedings to be had by the inferior court as the justice of the case might require; the applicable decisions of this Court being *Ballew* v. *United States*, 160 U. S. 187, and *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; 75 Law Ed. 688.

3. The decision of the Circuit Court of Appeals for the Third Circuit so restricts the powers given it under Section 701 of the Revised Statutes (fully set out in the brief accompanying this Petition) as to largely destroy and impair the power of the Federal Circuit Courts of Appeal to correct manifest wrongs. And it is important that the meaning of said Section should be authoritatively determined by this Court.

PRAYER.

WHEREFORE your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in this case which was entitled in that Court: Henry G. Montgomery, plaintiff-appellant v. Realty Acceptance Corporation, defendant-appellee, No. 4506, October Term 1930, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code, and that your Petitioner may have such further and other relief or remedy in the premises as to this Court may seem appropriate, and that the order or judgment of the Circuit Court of Appeals entered July 6, 1931, reversing the order of the District Court which opened the said judgment, be reversed; and likewise that the order or judgment of the Circuit Court of Appeals vacating its own order of June 28, 1930, which remanded the cause to the District Court, be reversed.

And your Petitioner will ever pray.

REALTY ACCEPTANCE CORPORATION,
By CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

STATE OF DELAWARE,
NEW CASTLE COUNTY, } *ss.:*

CHARLES F. CURLEY, being duly sworn, says that he is counsel for Realty Acceptance Corporation, the petitioner and that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

CHAS. F. CURLEY.

SWORN to and subscribed before me this fifteenth day of August, A. D. 1931.

MARGARET A. MURPHY,
Notary Public.

(Notary Seal)

BRIEF IN SUPPORT OF THE PETITION.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit was handed down on July 6, 1931, and has not yet been reported. It appears in the Record (Rec., p. 70).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now appearing as Section 347 (a) of Title 28 of the United States Code Annotated.

Statement.

A statement of the facts and of the errors assigned will be found in the petition for certiorari.

SUMMARY OF THE ARGUMENT.

I.

THE CASE BEING IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT ON APPEAL, THAT COURT HAD POWER TO REMAND THE CASE AND THE RECORD THEREIN TO THE DISTRICT COURT WITH AUTHORITY TO THE DISTRICT COURT TO VACATE THE JUDGMENT APPEALED FROM AND REOPEN THE CAUSE TO TAKE AND CONSIDER CERTAIN NEWLY DISCOVERED EVIDENCE, AND THIS WITHOUT REFERENCE TO THE EXPIRATION OF THE TERM OF THE DISTRICT COURT AT WHICH SUCH JUDGMENT WAS ENTERED.

II.

THE CIRCUIT COURT OF APPEALS HAD POWER TO AUTHORIZE A NEW TRIAL ON ONE SEPARABLE ISSUE ONLY OF THE CASE, AND THE ISSUE OF "THE QUANTUM OF PLAINTIFF'S DAMAGES" IN THIS CASE WAS A SEPARABLE ISSUE.

ARGUMENT.

THE CASE BEING IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT ON APPEAL, THAT COURT HAD POWER TO REMAND THE CASE AND THE RECORD THEREIN TO THE DISTRICT COURT WITH AUTHORITY TO THE DISTRICT COURT TO VACATE THE JUDGMENT APPEALED FROM AND REOPEN THE CAUSE TO TAKE AND CONSIDER CERTAIN NEWLY DISCOVERED EVIDENCE, AND THIS WITHOUT REFERENCE TO THE EXPIRATION OF THE TERM OF THE DISTRICT COURT AT WHICH SUCH JUDGMENT WAS ENTERED.

It is clear that after the appeal to the Circuit Court of Appeals was perfected all jurisdiction over the case was transferred from the District Court to the Court of Appeals, *Keyser* v. *Farr,* 105 U. S. 265, 26 Law Ed. 1025. Defendant's appeal was perfected at the same term at which the judgment appealed from was entered (Rec., appendix, p. 3). In the present case the Court of Appeals then having exclusive control of the appealed case, had ample power to authorize the District Court in the manner shown by its order of June 28, 1930.

In *Angle* v. *United States,* 162 Fed. 264, a situation somewhat similar to the one which confronted this Court in entering the order now challenged by this appeal was presented to the Judges of the Fourth Circuit. In that case the Court of Appeals was petitioned to modify its judgment of affirmance so that it would appear that

> "while the judgment of the court below is affirmed, it is remanded with leave to the court below to exercise its discretion in the matter of granting a new trial, on the ground of evidence discovered after the expiration of the term at which the judgment of conviction was entered, and after the cause had been removed to the

Circuit Court of Appeals by writ of error. Under the procedure as now established, in the absence of permission given by this court, it will be the duty of the court below, after it has received the mandate of this court affirming the judgment complained of, to see that the same is carried into execution."

Continuing, the Court said:

"It therefore becomes our duty by an examination of the affidavits in which the after discovered evidence is set forth to determine whether or not the petitioner has presented for our consideration such facts as will authorize us to suggest to the court below the propriety, in the light of the record of this cause, of hearing and of disposing of the motion for a new trial so far as the petitioner Angle is concerned." . . .

"While it is entirely proper for an appellate Court, in a case where the facts justify it, to remand a case with leave to the court below to hear a motion for a new trial, or to entertain further proceedings therein, nevertheless, in the case we now consider, we find it to be our duty to decline to modify the judgment complained of and to deny petitioner's prayer."

In *Scott* v. *United States,* 165 Fed. 172, the Circuit Court of Appeals for the Fifth Circuit said:

"The suggestion is made that if the case can be remanded to the Circuit Court, with authority to the trial judge to readjust the sentences, a compromise advantageous to both parties can be made. For authority for this court to affirm a sentence and yet remand, with instructions to the trial judge to exercise his discretion in modifying any sentence formerly imposed, we are

referred to the cases of Angle v. United States (C. C. A.) 162 Fed. 264, United States v. Wynn (C.C.) 11 Fed. 57, and Bates v. United States (C.C.) 10 Fed. 92.

"Unquestionably cases may arise in which similar authority may well be exercised, if the court has before it (and from the record) the circumstance to warrant action. For instance: If the case shows that a motion for a new trial on newly discovered evidence should be passed upon, or that a sentence is erroneous as beyond the statute, or the trial judge himself suggests that a mistake has been committed which he desires to correct. See section 701, Rev. St. U. S. Perhaps we could grant the relief asked for in this case under the authorities suggested; but we prefer to base our action upon the consent of the government, as shown by the acknowledgment appended to the petition above given.

"The judgment of the Circuit Court is affirmed, and the cause is remanded to the Circuit Court, with instructions to the trial judge herein to exercise his discretion in modifying any sentence which has heretofore been imposed upon the plaintiffs in error in this case."

Further, the Court of Appeals for the Fifth Circuit as late as March, 1927, again stated the same proposition in *Martin* v. *United States,* 17 Fed. (2d) 973 at 976, when it stated:

"The District Court had lost jurisdiction to entertain a motion for a new trial at the time the so-called confession of perjury was made, and may now exercise its discretion to grant or refuse a new trial only by the consent of this Court. We have no doubt that upon a proper showing it would be our duty to authorize the District Court to exercise that discretion."

Section 701 Revised Statutes, together with the application of such Section by the Supreme Court to Circuit Courts of Appeal, seems to entirely control the question here raised. Section 701 R. S. reads as follows:*

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution

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*NOTE: In Section 876 of Title 28 of United States Code which is intended to be a restatement of Section 701 R. S., an obvious error was made in omitting the words "circuit court, or district court acting as a circuit court," so that Section 876 of Title 28 seems to be limited to "a district court in prize causes." Notwithstanding this incorrect restatement in the Code, Section 701 R. S. is in effect for all purposes, because Section 2 (a) of the United States Code provides:

> "The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments." (Underscoring ours.)

in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

In *Bollew* v. *United States*, 160 U. S. 187, Chief Justice White after referring to Section 11 of the Act of March 3, 1891 (Act creating the United States Circuit Courts of Appeal), at page 201 of the report used the following language:

"With reference to the newly established courts, in section 11 of the act it was provided as follows:

'And all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.'

"It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases, to state courts and to the Circuit Courts in capital cases, was confessedly conferred by express statutory provisions, and that a like power was conferred upon the Circuit Courts of Appeals and Circuit Courts in cases where they exercised jurisdiction by error in criminal cases over the District Court."

"From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require."

It will be noticed that the objective of Chief Justice White was to show that a power which concededly by the statute was exercisable by both the Supreme Court and the Circuit Courts of Appeal in civil causes was exercisable also in criminal cases. It is earnestly submitted that *Ballew v. United States* shows conclusively that under Section 701 R. S., *supra*, a Circuit Court of Appeals as well as the Supreme Court "may direct such judgment . . . to be rendered, or such further proceedings to be had by the inferior court, **as the justice of the case may require.**"

From the foregoing it clearly appears that the Circuit Courts of Appeal for the Fourth Circuit and for the Fifth Circuit were right in their above cited holdings, and conversely, that the Circuit Court of Appeals for the Third Circuit in the present case was wrong in holding that the expiration of the trial term at which the judgment appealed from was entered left it without authority to make its order of June 28, 1930. The Court of Appeals for the Third Circuit states in its opinion that it is controlled by the decision of this Court in *United States* v. *Mayer*, 235 U. S. 55. That decision simply held that a District Court had no power to modify its judgment after the expiration of the term at which such judgment was entered. Here the Circuit Court of Appeals ignores the above quoted decisions of the Circuit Courts of Appeal for the Fourth Circuit and for the Fifth Circuit. It makes no reference to our argument that at the time of its order of June 28, 1930, the case was exclusively in that Court, and that the District Court in opening the judgment was exercising not any power of its own but only the authority given to it for the purpose by the Court of Appeals which then had exclusive control of the case. In the case in the Fourth Circuit and in the two

cases in the Fifth Circuit, the judgment term of the trial court had expired and yet both courts affirmatively asserted their power to authorize a new trial by the trial court. Such decisions are squarely in conflict with the decision of the Court of Appeals in this present case.

That the newly discovered evidence complied with the requirements of due diligence on defendant's part and was material on the issue of plaintiff's damages are questions affirmatively decided in this case by both the Court of Appeals and by the District Court.

Such decision of the Court of Appeals for the Third Circuit is also squarely in conflict with the decisions of this Court in *Ballew* v. *United States, supra*, and in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; 75 Law Ed. 688. The Court of Appeals below in its opinion ignores the language of Section 701 Revised Statutes (previously quoted herein) as well as this Court's decision in *Ballew* v. *United States* (hereinbefore quoted from) to the effect that Circuit Courts of Appeal as well as the Supreme Court were authorized, not only to examine, modify or reverse any judgment of a District Court, but also to direct or authorize any further proceedings in the inferior Court as the justice of the case might require. Section 701 Revised Statutes as well as this Court's decision in *Ballew* v. *United States* appeared upon petitioner's brief in the Court below.

In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; 75 Law Ed. 688, the Circuit Court of Appeals for the First Circuit had vacated the judgment of the District Court but set aside the verdict only as to damages and had remanded the case to the District Court for a new trial on the question only of the damages of de-

fendant below under its counterclaim. This Court, while affirming the power of a Circuit Court of Appeals to award a new trial on one separable issue only, nevertheless reversed the Court of Appeals for the First Circuit on the ground only that in that case the issue of defendant's damages under its counterclaim was not an issue separable from the other issues in that case. In that case, as in this, the judgment term of the District Court had expired. It is submitted that the order of June 28, 1930, of the Court of Appeals for the Third Circuit in this present case was in substance the same as the order of the Court of Appeals for the First Circuit in that case. In that case the judgment was vacated by the Court of Appeals; in this present case the Court of Appeals authorized the District Court to so vacate. In that case the verdict was set aside only as to defendant's damages under its counterclaim and in all other respects affirmed; in this present case the District Court was authorized to set aside the verdict as to plaintiff's damages only. What was there done was what was here done except as to form only. This Court recognised as proper that Court's proceedings save as to the separable quality of the issue upon which the new trial was authorized.

THE CIRCUIT COURT OF APPEALS HAD POWER TO AUTHORIZE A NEW TRIAL ON ONE SEPARABLE ISSUE ONLY OF THE CASE, AND THE ISSUE OF "THE QUANTUM OF PLAINTIFF'S DAMAGES" IN THIS CASE WAS A SEPARABLE ISSUE.

In *Gasoline Products Co. v. Champlin Refining Co., supra*, this Court upheld the power of a Court of Appeals to direct a new trial on one separable issue only. This Court said:

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

This Court reversed, however, because the issue of "defendant's damages under its counterclaim" was "so interwoven with that of liability that the former could not be submitted to the jury independently of the latter without confusion and uncertainty"; as stated by this Court the dates of the contracts there alleged to have been breached and the date of the breach had not been found by the jury and such dates were material to any determination of such damages.

In this present case the issue of the "quantum of the judgment" to which the new trial was limited, was not related to, connected with or dependent upon any other fact or law issue in the case. The action here was for damages for the alleged breach of an employment contract whose term was five years from a specified date, at a specified annual salary. (Rec., appendix, p. 9.) In the pleadings the defendant admitted the execution of the contract and of course its date; likewise its repudiation (claimed to be justified) of such contract, and the date of such repudiation. (Rec., appendix, pp. 30-40.) The trial court in its "findings and verdict" (Rec., appendix, p. 188 at bottom) said: "As the contract was valid and as it has been broken by the defendant, the plaintiff is entitled to a judgment for his damages. The measure of damages for the breach is the contract price unpaid, less the sums, if any, shown in mitigation of damages." All defenses legally justifying its alleged breach of its contract were rejected by the District

Court whose decision as to such was affirmed by the Court of Appeals. The salary for the balance of the contract term was, of course, a fixed amount, and hence the only issue to be determined was the amount in mitigation to be deducted therefrom, namely, the amount of plaintiff's earnings during the remainder of the contract term. Under the order of the Court of Appeals of June 28, 1930 the District Court was authorized to determine anew the amount of plaintiff's damages because the after-discovered evidence showed that the plaintiff's earnings after the breach were very much greater in amount than testified to by him at the trial. This is shown by the Court of Appeals in its opinion, where it states: "On the issue of damages the plaintiff proved his loss without testifying, in mitigation of damages, to money he had earned after his discharge, which, if earned, he was, of course, bound to state." (Rec., p. 70 at bottom.) Again the Court of Appeals in referring to the newly discovered evidence stated in its opinion: "*This evidence as presented by the defendant's verified petition and not controverted by the plaintiff* tended to prove that the plaintiff had since his discharge earned a substantial sum of money concerning which at the trial he did not testify in mitigation of damages, and that the discovery was made under circumstances which, as to the defendant's diligence, brought it within the rule of after-discovered evidence." (Rec., p. 71, 18th line.)

The Court of Appeals below in its opinion stated (Rec., p. 74, lines 13-17) it made a mistake in authorizing the District Court to have a new trial on this one issue without first requiring defendant to show that the matter was of a kind triable on a single issue. We do not know what the Court of Appeals intended by this statement. It refrains

from stating that such issue was not a separable one. It is submitted that such a statement was relatively impossible. The hearing on defendant's petition for leave in the Court of Appeals proceeded on the unquestioned basis that every issue of law and fact in the case was foreclosed against the defendant except the single issue of the amount of plaintiff's earnings after his discharge. The after-discovered evidence related exclusively to the amount of such earnings. The order of the Court of Appeals of June 28, 1930, expressly confined the new trial to the "quantum of the said judgment," which in this case necessarily limited the new trial issue to the amount of plaintiff's earnings after his discharge. The issue of the "quantum of the said judgment" in this case was clearly a separable issue within this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the order or judgment of the Circuit Court of Appeals for the Third Circuit entered July 6, 1931, reversing the order of the District Court which opened the said judgment, should be reversed; and also that the order or judgment of the Circuit Court of Appeals entered July 6, 1931, vacating its own order of June 28, 1930, which remanded the cause to the District Court with authority to reopen, should be reversed.

CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

No. 314. October Term, 1931.

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY.

BRIEF FOR PETITIONER.

I. OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit, to be reviewed in this proceeding, is reported in 51 Fed. (2d) 642 (R., 54).

II. JURISDICTION.

This case comes before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, granted October 19, 1931 (R., 223), under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now appearing as Section 347 (a) of Title 28 United States Code Annotated.

III. STATEMENT OF THE CASE.

Henry G. Montgomery (hereinafter referred to as "plaintiff") brought an action at law against petitioner, Realty Acceptance Corporation (hereinafter referred to as "defendant"), in the District Court of the United States

for the District of Delaware, to recover damages arising from defendant's alleged breach of its contract to employ plaintiff for a term of years as its President. Under a written stipulation the case was tried to the Court without the intervention of a jury. The question as to the enforceability of the contract and all other legal defenses were determined by the trial court adversely to the defendant, and in favor of the plaintiff. The trial court recognized and applied the well-settled principle that plaintiff's damages were prima facie the contract salary for the balance of the contract term of employment, less plaintiff's earnings during such remaining term. Plaintiff testified as to his occupation and earnings during such remaining period. His testimony was the sole testimony as to such earnings and was not at the trial controverted by defendant. On May 1, 1929, the trial court rendered its verdict in favor of the plaintiff and assessed plaintiff's damages at the sum of $80,500 (R., 196). On May 11, 1929, judgment was entered in that amount. (R., 61.) On June 6, 1929, being at the same term of court at which the verdict was rendered and judgment entered, defendant perfected its appeal to the United States Circuit Court of Appeals for the Third Circuit (R., 208).

On January 15, 1930, the Court of Appeals handed down its *per curiam* opinion finding that the judgment below should be affirmed (R., 212) [51 Fed. (2d) 636-641]. The defendant filed its petition for rehearing which operated to stay the mandate. While this petition for rehearing was pending, defendant filed in the Court of Appeals its petition supported by affidavits. Such petition and affidavits set out newly discovered evidence showing that the uncontroverted testimony of the plaintiff at the trial in the District Court as to the amount earned by the plaintiff during the balance of the contract period of employment was in a most material manner incorrect and untrue, and that as a result of such incorrect and untrue testimony he had obtained judgment for a shockingly unwarranted and unjust amount. The peti-

tioner requested leave of the Court of Appeals to ask the District Court to request the Court of Appeals to remand the cause and the record therein to the District Court, to the end that it might vacate its judgment and reopen the cause for the purpose of taking and considering the newly discovered evidence bearing solely on the quantum of the judgment (R., 3). On March 26, 1930, the Court of Appeals entered an order granting the leave sought by petitioner, and further ordered that all proceedings in the cause then pending in that court be stayed until after the District Court should have heard and decided defendant's petition and if allowed, until it should have finally acted upon the matters raised thereby (R., 11).

Pursuant to the leave granted by the Court of Appeals defendant filed its petition, supported by affidavits, in the District Court. After a full hearing the District Court on June 23, 1930, entered an order that the Court of Appeals be requested to dismiss the pending appeal without prejudice, and to remand the cause and the record to the District Court to the end that that court might vacate the judgment entered therein and on defendant's application reopen the cause for the purpose of taking and considering the certain newly discovered evidence bearing solely on the quantum of the judgment (R., 44). The last mentioned order having been certified to the Court of Appeals, that Court on June 28, 1930, entered an order dismissing defendant's appeal from the said judgment "without prejudice" and remanding the cause and the record therein to the District Court "to the end that the said District Court may vacate the judgment entered herein and on application of defendant-appellant reopen the said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (R., 45). The order of the Court of Appeals having been certified to the District Court, that court, on June 30, 1930, entered an order setting aside the judgment and reopening the cause "for the purpose of

taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (R., 48).

On September 11, 1930, plaintiff appealed to the United States Circuit Court of Appeals for the Third Circuit from the last mentioned order of the District Court. Before this appeal was heard plaintiff also filed a motion in the Court of Appeals asking that court to vacate its order of June 28, 1930. Plaintiff's appeal and motion were grounded on the contention that the Court of Appeals, notwithstanding the cause was then pending (undetermined) in that court on an appeal seasonably taken from the District Court, had no authority to authorize the District Court to open the judgment in the trial court and take and consider newly discovered evidence, because at the time of making such order the term of the District Court at which such judgment was entered had expired.

On July 6, 1931, the Court of Appeals handed down an opinion (R., 54), and pursuant to such opinion entered two judgments, one directing that the order of the District Court of June 30, 1930, vacating the judgment entered therein should be reversed (R., 59); and the second directing that the order of the Court of Appeals of June 28, 1930, dismissing without prejudice the first appeal taken by defendant and remanding the cause to the District Court to the end that that court might open the judgment and hear newly discovered evidence solely on the quantum of plaintiff's damages, be vacated (R., 212). In thus vacating its own order the Court of Appeals appears to have based its action on the fact alone that the date of such order was after the expiration of the term of the District Court at which such judgment had been entered. This despite the fact that the District Court in setting aside the judgment was not exercising any power qua District Court but only acting under express authority to it from the Court of Appeals which then had sole control of the cause; and de-

spite the fact that Section 701, Revised Statutes (Title 28, U. S. C. A., sec. 876), was called to the court's attention.

It is not disputed that petitioner complied with the requirement of due diligence on its part with respect to the newly discovered evidence and that such evidence was material on the issue of plaintiff's damages. Each of these questions was affirmatively decided by both the Court of Appeals and by the District Court.

Specification of Errors.

The petitioner insists that the Circuit Court of Appeals erred—

1. In holding that because of the expiration of the term of the District Court at which the judgment was entered it was without power to authorize the District Court to vacate the judgment and reopen the cause to hear and consider certain newly discovered evidence bearing solely on the quantum of plaintiff's damages although an appeal had been seasonably taken and was then pending in the Appellate Court.

2. In holding that its order of June 28, 1930, dismissing defendant's appeal without prejudice and remanding the cause to the District Court to the end that that Court might vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment, should be vacated.

SUMMARY OF THE ARGUMENT.

I.

The case being in the Circuit Court of Appeals on appeal seasonably taken, that Court had power to remand the case and the record therein to the District Court with authority to the District Court to vacate the judgment appealed from and reopen the cause to take and consider

certain newly discovered evidence, and this without reference to the expiration of the term of the District Court at which such judgment was entered.

II.

The decision of the Court of Appeals so restricts the powers given it under section 701 of the Revised Statutes (Title 28, U. S. C. A., sec. 876), as to largely destroy the power of a United States Circuit Court of Appeals to correct manifest wrongs.

III.

The Circuit Court of Appeals had power to authorize a new trial on one separable issue only of the case, and the issue of "the quantum of plaintiff's damages" in this case was clearly a separable issue.

ARGUMENT.

Point I.

The case being in the Circuit Court of Appeals on appeal seasonably taken, that Court had power to remand the case and the record therein to the District Court with authority to the District Court to vacate the judgment appealed from and reopen the cause to take and consider certain newly discovered evidence, and this without reference to the expiration of the term of the District Court at which such judgment was entered.

Verdict was rendered May 1, 1929. Judgment on the verdict was entered May 11, 1929, as of May 1, 1929 (R., 61). Defendant's appeal was allowed and bill of exceptions signed June 6, 1929 (R., 208). Appeal was perfected June 7, 1929. The terms of the United States District Court for the District of Delaware are fixed by statute. They are four, held on the second Tuesdays of March, June, September and December (Act of March 3, 1911, c. 281, sec. 75; 28 U. S. C. A., sec. 148). The court will take judicial notice that the March Term, 1929, of the District Court for the District of Delaware, commenced March 12, 1929, and expired by limitation June 10, 1929. It thus appears that in this case verdict was rendered, judgment entered, and appeal perfected, all at the same term and there can be no question but that the case was properly pending in the Circuit Court of Appeals.

It is settled that after an appeal to a United States Circuit Court of Appeals has been taken and perfected, all jurisdiction over the case is transferred from the District Court to the Court of Appeals. Keyser v. Farr, 105 U. S. 265, 26 Law Ed. 1025. In the present case the Court of Appeals having acquired exclusive jurisdiction over and control of the appealed case, that Court had full power to authorize the District Court in the manner shown by its order of June 28, 1930, and the action of the District Court pursuant to the authority contained in that order was legally justified and proper.

In Angle v. United States, 162 Fed. 264, a situation somewhat similar to the one which confronted the Court in entering the order now challenged was presented to the Judges of the Fourth Circuit. In that case the Court of Appeals was petitioned to modify its judgment of affirmance so that it would appear that

> "while the judgment of the court below is affirmed, it is remanded with leave to the court below to exercise its discretion in the matter of granting a new trial, on the ground of evidence discovered *after the expiration of the term at which the judgment of conviction was entered,* and after the cause had been removed to the Circuit Court of Appeals by writ of error. Under the procedure as now established, in the absence of permission given by this court, it will be the duty of the court below, after it has received the mandate of this court affirming the judgment complained of, to see that the same is carried into execution."

Continuing, the Court said:

> "It therefore becomes our duty by an examination of the affidavits in which the after discovered evidence is set forth to determine whether or not the petitioner has presented for our consideration such facts as will authorize us to suggest to the court below the propriety, in the light of the record of this cause, of hearing and of disposing of the motion for a new trial so far as the petitioner Angle is concerned." . . .
>
> "*While it is entirely proper for an appellate Court, in a case where the facts justify it, to remand a case with leave to the court below to hear a motion for a new trial,* or *to entertain further proceedings therein,* nevertheless, in the case we now consider, we find it to be our duty to decline to modify the judgment complained of and to deny petitioner's prayer."

In Martin v. United States, 17 Fed. (2d) 973, after the expiration of the trial term, application was made to the Court of Appeals for the Fifth Circuit (in which an appeal was then pending) to authorize the Trial Court to entertain a motion for a new trial. At page 976 the Court held,—

> "The District Court had lost jurisdiction to entertain a motion for a new trial at the time the so-called confession of perjury was made, and may now exercise its discretion to grant or refuse a new trial *only by the consent of this Court. We have no doubt that upon a proper showing it would be our duty to authorize the District Court to exercise that discretion.*"

Further in Scott v. United States, 165 Fed. 172, and in Davis v. United States, 47 Fed. (2d) 1071, and in Perry v. United States, 39 Fed. (2d) 52, the Court of Appeals for the Fifth Circuit held to the same effect. In Perry v. United States, the Court in passing on such a motion long after the expiration of the judgment term of the Trial Court, at page 54, held,—

> "There is no doubt that in a proper case a motion to remand to the District Court with permission to consider newly discovered evidence or to show perjury on the part of a material witness may be granted in the discretion of the appellate court in order to do justice."

In Larrison v. United States, 24 Fed. (2d) 82, the Circuit Court of Appeals for the Seventh Circuit entertained no doubt whatever of its power, in a case before it on appeal, to remit the record to the Trial Court with authority to grant a new trial.

In the recent case of Gasoline Products Company v. Champlin Refining Company, 283 U. S. 494, 75 Law Ed. 1188, the Circuit Court of Appeals for the First Circuit had reversed a judgment of the District Court of the United States for the District of Maine *but set aside the verdict only as to damages,* and had remanded the case to the District Court for a new trial on the question only of the damages of defendant below under its counterclaim. This court while affirming the power of a Circuit Court of Appeals to award a new trial on one separable issue only, nevertheless reversed the Court of Appeals for the First Circuit

on the ground only that in that case the issue of defendant's damages under its counterclaim was not an issue separable from the other issues in that case. It is respectfully submitted that the decision of this Court in Gasoline Products Company v. Champlin Refining Company, *supra*, fully and completely sustains the position of the petitioner in this proceeding and the decisions of the Circuit Courts of Appeal for the Fourth and Fifth and Seventh Circuits in the cases cited. In the Gasoline Products Co. case, and in the cases in the Fourth and Fifth and Seventh Circuits, as in this, the judgment term of the District Court had expired. In that case as in these an appeal had been seasonably taken and the case was exclusively within the control of the Court of Appeals. The order of June 28, 1930 of the Court of Appeals in this case was in substance the same as the order of the Court of Appeals of the First Circuit in that case. In that case judgment was vacated by the Court of Appeals; in this case the Court of Appeals authorized the District Court to vacate the judgment. In that case the verdict was set aside only as to defendant's damages under its counterclaim and in all other respects affirmed; in this case the judgment as to plaintiff's damages only was set aside and the verdict for the plaintiff in all other respects left unaffected. What was there done was what was here done, except as to form only. This Court recognized as proper the proceedings in that case save as to the separable quality of the issue upon which the new trial was authorized.

Point II.

The decision of the Court of Appeals so restricts the powers given it under section 701 of the Revised Statutes (Title 28 U. S. C. A. Sec. 876) as to largely destroy the power of a United States Circuit Court of Appeals to correct manifest wrongs.

The Court of Appeals in entering its order of June 28, 1930 was acting well within the power conferred upon it by the above statute. Section 701 R. S. reads:*

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, *or* may direct such judgment, decree, or order to be rendered, *or* such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

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*NOTE: In Section 876 of Title 28 of United States Code which is intended to be a restatement of Section 701 R. S., an obvious error was made in omitting the words "circuit court, or district court acting as a circuit court," so that Section 876 of Title 28 seems to be limited to "a district court in prize causes." Notwithstanding this incorrect restatement in the Code, Section 701 R. S. is in effect for all purposes, because Section 2 (a) of the United States Code provides:

> "The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. *In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.*" (Italics ours.)

This section, though passed by Congress before the passage of the Act creating the Circuit Courts of Appeal, has been declared by the Supreme Court to be applicable to Circuit Courts of Appeal as well as to the Supreme Court. In Ballew v. United States, 160 U. S. 187, Chief Justice White after referring to Section 11 of the Act of March 3, 1891 (Act creating the United States Circuit Courts of Appeal), at page 201 of the report used the following language:

> "With reference to the newly established courts, in section 11 of the act it was provided as follows:
>
> > 'And all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.'
>
> "It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases, to state courts and to the Circuit Courts in capital cases, was confessedly conferred by express statutory provisions, *and that a like power was conferred upon the Circuit Courts of Appeals and Circuit Courts in cases where they exercised jurisdiction by error in criminal cases over the District Court.*"
>
> "From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, *it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require.*"

It will be noticed that the objective of Chief Justice White was to show that a power which concededly by the statute was exercisable by both the Supreme Court and the

Circuit Courts of Appeals *in civil causes* was exercisable also in criminal cases. It is earnestly submitted that Ballew v. United States shows conclusively that under Section 701 R. S., *supra,* a Circuit Court of Appeals as well as the Supreme Court "may direct such judgment . . . to be rendered, or such further proceedings to be had by the inferior court, *as the justice of the case may require.*"

From the foregoing it clearly appears that the Circuit Court of Appeals for the Third Circuit, in the present case, in holding that the expiration of the trial term at which the judgment appealed from was entered left it without authority to make its order of June 28, 1930, was in direct conflict with the decision of this Court in the Gasoline Products Company case and with the cited decisions of the Circuit Courts of Appeal for the Fourth and Fifth and Seventh Circuits, and in disregard of the express statutory provisions of Section 701 R. S.

The Court of Appeals states in its opinion that it is controlled by the decision of this court in United States v. Mayer, 235 U. S. 55. That decision, however, simply held that a District Court had no power to set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during the term. It is respectfully submitted that that case is clearly distinguishable from the instant case. There the application was made to the District Court *after* the expiration of the term at which the judgment was entered, and such application was heard on the merits by the District Court by consent of the parties. No authority to the District Court from an Appellate Court was present, and it was not acting pursuant to a mandate or authority of any Appellate Court which then controlled the case. At that time the District Court unquestionably had lost jurisdiction of the case. Here an appeal had been seasonably taken by the defendant and at the time of the entry of its order of June 28, 1930, the case was exclusively in the Appellate Court and under its jurisdiction. The District

Court in opening the judgment was exercising not any power of its own but only the authority given to it for the purpose by the Court of Appeals which then had sole control of the cause.

The Court of Appeals in its opinion also states that it was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term." Here again, it is respectfully submitted, the Court of Appeals overlooks the fact that by the appeal seasonably taken, jurisdiction of the cause was transferred to the Court of Appeals, and that Section 701 R. S. expressly conferred upon the Court of Appeals authority in cases "lawfully brought before it for review" to do exactly what it did do, that is, direct "such further proceedings to be had by the inferior court *as the justice of the case may require.*"

We submit that this Court's decision in Gasoline Products Company v. Champlin Refining Company is conclusive as to the power of a Circuit Court of Appeals in a case pending therein on appeal to authorize the Trial Court to hear evidence concerning, and correct the result of mistake or fraud in the judgment below. But without such decision we feel confident that the plain meaning of the language of Section 701 Revised Statutes, as well as the end for which courts exist, namely to do substantial justice between parties, would prevent such a forced construction of such language as would withdraw from a Federal Appellate Court the power to act as in this case.

Point III.

The Circuit Court of Appeals had power to authorize a new trial on one separable issue only of the case, and the issue of "the quantum of plaintiff's damages" in this case was a separable issue.

In Gasoline Products Co. v. Champlin Refining Co., *supra,* this Court upheld the power of a Court of Appeals to

direct a new trial on one separable issue only. This Court said:

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

This Court reversed, however, because the issue of "defendant's damages under its counterclaim" was "so interwoven with that of liability that the former could not be submitted to the jury independently of the latter without confusion and uncertainty"; as stated by this Court the dates of the contracts there alleged to have been breached and the date of the breach had not been found by the jury and such dates were necessary to any determination of such damages.

In this present case the issue of the "quantum of the judgment" to which the new trial was limited, was not related to, connected with or dependent upon any other issue of law or of fact in the case. The action here was for damages for the alleged breach of an employment contract whose term was a specified period from a specified date at a specified annual salary. (R., 64.)

In the pleadings the defendant admitted the execution of the contract and of course its date; likewise its repudiation (claimed to be legally justified) of such contract, and the date of such repudiation. (R., 82-89.)

The trial court in its "findings and verdict" said: "As the contract was valid and as it has been broken by the defendant, the plaintiff is entitled to a judgment for his damages. The measure of damages for the breach is the contract price unpaid, less the sums, if any, shown in mitigation of damages." (R., 203, 7th line.) All defenses legally justifying its alleged breach of contract were rejected by the District Court whose decision as to such was affirmed by the Court of Appeals. The salary for the balance of the contract term was, of course, a fixed amount,

and hence the only issue to be determined was the amount in mitigation to be deducted therefrom, namely, the amount of plaintiff's earnings during the remainder of the contract term. Under the order of the Court of Appeals of June 28, 1930, the District Court was authorized to determine anew the amount of plaintiff's damages because the after-discovered evidence showed that the plaintiff's earnings after the breach were very much greater in amount than testified to by him at the trial. This is shown by the Court of Appeals in its opinion, where it states: "On the issue of damages the plaintiff proved his loss without testifying, in mitigation of damages, to money he had earned after his discharge, which, if earned, he was, of course, bound to state." (R., 55, 7th line.) Again, the Court of Appeals in referring to the newly discovered evidence stated in its opinion: "This evidence as presented by the defendant's verified petition and *not controverted* by the plaintiff tended to prove that the plaintiff has since his discharge earned a substantial sum of money concerning which at the trial he did not testify in mitigation of damages, and that the discovery was made under circumstances which, as to the defendant's diligence, brought it within the rule of after-discovered evidence." (R., 55, 25th line.)

The Court of Appeals below in its opinion stated (R., 57, at bottom) it made a mistake in authorizing the District Court to have a new trial on this one issue without first requiring defendant to show that the matter was of a kind triable on a single issue. We do not know what the Court of Appeals intended by this statement. It refrains from stating that such issue was not a separable one. It is submitted that such a statement was relatively impossible. The hearing on defendant's petition for leave in the Court of Appeals proceeded on the unquestioned basis that every issue of law and fact in the case was foreclosed against the defendant except the single issue of the amount of plaintiff's earnings after his discharge. The after-discovered evidence related exclusively to the amount of such earnings. The

order of the Court of Appeals of June 28, 1930 expressly confined the new trial to the "quantum of the said judgment," which in this case necessarily limited the new trial issue to the amount of plaintiff's earnings after his discharge. The issue of the "quantum of the said judgment" in this case was clearly a separable issue within this Court's decision in Gasoline Products Co. v. Champlin Refining Co.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the order or judgment of the Circuit Court of Appeals for the Third Circuit, entered July 6, 1931, reversing the order of the District Court entered June 30, 1930, setting aside the judgment and reopening the case for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment, should be reversed and the order of the District Court affirmed; and also that the order or judgment of the Circuit Court of Appeals, entered July 6, 1931, vacating its own order of June 28, 1930 which remanded the cause to the District Court with authority to vacate the judgment and reopen the cause, should be reversed.

CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

SUBJECT-MATTER INDEX.

ARGUMENT.

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The authorities cited by respondent do not sustain his contentions, inasmuch as none of them denies the power of the Circuit Court of Appeals by virtue of Section 701 R. S. to endue the District Court with a new power over the cause 1, 2, 3, 4

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IN THE

Supreme Court of the United States

REALTY ACCEPTANCE CORPORATION,

Petitioner,

v.

HENRY G. MONTGOMERY,

Respondent.

REPLY BRIEF FOR PETITIONER.

The brief of respondent is principally devoted to a contention which we do not dispute. We admit that the power of a District Court over a cause submitted to it expires upon the perfecting of a writ of error to the Circuit Court of Appeals or the expiry of the term of the District Court. Our contention is that the Circuit Court of Appeals by virtue of Section 701 R. S. has the power to endue the District Court with a new power over the cause.

We, therefore, deem it appropriate that we reply only to so much of respondent's brief as deals with the powers of an appellate tribunal under Section 701 R. S.

Respondent at page 21 of his brief contends that the language of Section 701 R. S., namely, "or may direct such further proceedings to be had by the inferior court as the justice of the case may require," affords no statutory sanction for the order of the Court of Appeals of June 28, 1930, authorizing the District Court to consider the newly discovered evidence. Yet no reason for such contention, other than his own

view, is advanced. The action of the Court of Appeals in so authorizing the District Court, and the action of the District Court under such authority in opening its judgment, is here conclusive that "the justice of the case" required such action in order to prevent gross injustice. No other statute, nor any other wording in Section 701 R. S. is suggested by respondent as qualifying the ordinary plain meaning of the language in question. The natural construction thereof is helped by the title of Section 701 R. S. It is not entitled an act to change the procedure in the Supreme Court, or to amplify or to restrict the power of that Court in cases before it on appeal, but its title reads

> *"An act to further the administration of justice"* (17 Stat. at L., p. 196).

The contention of the respondent, as set out in his brief on page 15, is that the Court of Appeals can only reverse, modify or affirm the judgment of the District Court. Logically, this contention carries him to the utterly untenable position that, upon a hearing, the Appellate Court must confine its action to the decree appealed from and is without power to direct proceedings in the District Court. If the power of the Court of Appeals is so confined, it would have no authority to direct further proceedings in the District Court; yet it is the universal practice of such courts to direct new trials, modify judgments, direct accountings and generally do what justice requires. For instance, in the case of *Kendall* v. *Ewart*, this Court, on appeal and acting on its powers under Section 701 R. S., remanded the cause for the revision of the decree, cancellation of deeds, and also for an accounting for rents and profits, indemnification against existing liens and for further proceedings in accordance with the opinion.

Kendall v. *Ewart*, 259 U. S. 139.

Ballew v. *United States*, 160 U. S. 187, was cited by petitioner on the primary point that Section 701 R. S. applied to the Federal Courts of Appeal as well as to the Supreme Court. We think it likewise is in conflict with the narrow construction placed on said section by respondent in that it not only reversed the judgment of the lower court but likewise directed that court to enter judgment on one count and take other proceedings on the other count. In this case, Chief Justice WHITE traces the history of the power of courts of appeal at common law, by statute in England and by statute in the United States, and after quoting Section 701 R. S. as the same appeared in the Act of June 1, 1872, he states the conclusion of the Court to be

> "From this and from a review of the legislation on the subject of the powers conferred upon this Court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice not only in civil but in criminal cases might require."

It is significant that, in dealing with Section 701, the Chief Justice makes no allusion to the cases of *Roemer* v. *Simon* and *Russell* v. *Southard*, discussed *infra*.

Roemer v. *Simon*, 91 U. S. 149, is respondent's chief reliance. An analysis of the case will not show the pertinency respondent claims for it. It appears that a decree in a patent cause entered by the Trial Court had been appealed to the Supreme Court. Before any argument of such appeal, a motion to set aside the decree below and for a rehearing was filed, and denied. The two points actually decided were (1) that the Supreme Court could not *on motion and before hearing the cause* set aside the decree below; and (2) that any application to it for leave for a rehearing should be made by the court below and not by a party. All else in the short

opinion was *obiter*. At a later time the Supreme Court heard the appeal on the merits and disposed of it. It is submitted that this Court would not have used the *obiter* language concerning the uselessness of remanding because of the expiration of the Trial Term below, without expressly distinguish ng or somehow expressly viewing as inapplicable the plain language of Section 701 R. S., if it had undertaken to construe it. It is manifest that, in this opinion, it merely envisaged the power of the lower court if the motion to remand was granted prior to the hearing and before this Court acted on the appeal. It did not purport to define the powers of the *Appellate Court* under said section.

The decision in *Russell* v. *Southard*, 12 How. 138, cited on page 16 of respondent's brief, is without any application here. It simply stated the practice of an equity court that no evidence not before the court below could be received on the hearing of an appeal. Also, this decision was long prior to the enactment of Section 701 R. S.

This decision construed the Act of September 24, 1789, c. 20, 1 Stat. 73, 85, which was set out in the case of *Ballew* v. *United States, supra*, as follows:

> "that when a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment or pass such decree as the District Court should have rendered or passed, and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision."

Manifestly, it has no bearing upon Section 701 enacted some twenty years later.

It is, therefore, submitted that nothing in respondent's brief indicates that this Court has ever undertaken to limit the powers of an appellate tribunal to deal with manifest wrong as the ends of justice might require.

The case of *Hazeltine* v. *Wildermuth*, 35 F. (2nd) 733, not cited in our main brief, fully sustains our contention.

CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

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No. 314. October Term, 1931.

IN THE

SUPREME COURT OF THE UNITED STATES

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY,
Respondent.

REPLY BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 314

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. .....

REALTY ACCEPTANCE CORPORATION,
Petitioner,
v.
HENRY G. MONTGOMERY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit (R., pp. 70-75) has not yet been officially reported.

JURISDICTION.

The orders sought to be reviewed (R., 76, Appendix, p. 320) were entered July 6, 1931. The petition for writ of certiorari was filed August 19, 1931. The jurisdiction of this court rests upon the provisions of section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT.

The petitioner herein (defendant below) seeks to have this Court review on certiorari two orders of the Circuit Court of Appeals for the Third Circuit entered herein on July 6, 1931. By one of said orders (R., p. 76) the Circuit Court of Ap-

peals reversed an order of the District Court of Delaware entered June 30, 1930 (R., p. 59) whereby said court at its June Term 1930 purported to set aside its own judgment entered in plaintiff's favor on May 11, 1929 (R., p. 4) at the March Term 1929 of said court, and to grant a new trial upon alleged newly discovered evidence.

The inaccuracy in plaintiff's testimony, upon which petitioner based its motion for a new trial, related to the amount of plaintiff's capital contribution to a joint speculative venture upon which he had embarked with another after his wrongful discharge from petitioner's employment (R., pp. 4d-4l). Plaintiff's testimony that the arrangement called for an equal contribution of capital by him was inaccurate in that it required him to contribute only one-fourth of the capital. Plaintiff's testimony in that regard was based entirely on his recollection of the contents of a written instrument, the arrangement having been covered by a written agreement (Appendix, p. 101) which petitioner did not even ask plaintiff to produce.

The judgment in plaintiff's favor was a final judgment which had been affirmed by the Circuit Court of Appeals in a *per curiam* opinion on January 15, 1930 (See, p. 319, Transcript on *Appeal of Realty Acceptance Corporation, Defendant-Appellant* v. *Henry G. Montgomery, Plaintiff-Appellee,* No. 4216, October Term 1929, attached as Appendix to Transcript of Record on this appeal) and the District Court's order vacating said judgment and granting a new trial on newly discovered evidence concededly was entered long after the expiration of the March Term 1929 of the District Court at which said judgment had been entered. The petitioner had on March 25, 1930 obtained an order (R., p. 5) from the Cir-

cuit Court of Appeals granting petitioner leave to apply to the District Court to have that court request the Circuit Court of Appeals to remand the cause so that the District Court could vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment, and staying further proceedings in the cause until after the District Court heard petitioner's motion, and, if allowed, until the District Court should have finally acted upon the matters raised thereby.

By the second of said orders sought to be reviewed (Appendix, R., p. 320) the Circuit Court of Appeals granted plaintiff's motion and vacated its own *per curiam* order which it had entered June 28, 1930, at the request of the District Court, and which had dismissed petitioner's appeal "without prejudice" and had remanded the cause "to give the District Court a free hand" (R., p. 74, line 21) to grant a new trial.

The Circuit Court of Appeals, in entering the orders complained of, filed a reasoned opinion (R., pp. 70-75) holding that the District Court of Delaware was without jurisdiction at its June 1930 Term, to vacate its own judgment in plaintiff's favor entered May 11, 1929 at the March Term 1929 of said court, and that by its order of remand of June 28, 1930, the Circuit Court of Appeals was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term" (R., p. 74). It therefore held that the order of the District Court vacating said judgment should be reversed and that its own order of remand should be vacated to permit the release of the mandate of affirmance in accordance with its order of affirmance entered January 15,

judgment after the expiration of the judgment term and had granted a new trial upon the ground of alleged "irregularity, surprise, fraud and deceit in the procurement of said verdict and judgment". This Court said in part (p. 668, *et seq.*):

> "The legal proposition involved in the judgment complained of and necessary to maintain it is that the Supreme Court of this District at special term has the same discretionary power over its judgments, rendered at a previous term of the court, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments when such proceedings are taken during the term at which they were rendered; and that this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error (p. 679). We * * * are of opinion, and so decide, that, after the term at which they were rendered, the power of the court over the parties and over its record remains only in the excepted cases already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief."

In *United States* v. *Mayer*, 235 U. S. 55, a defendant, who after trial had been convicted in a criminal cause on five counts for violations of the mail fraud sections of the Federal Criminal Statutes, moved in the District Court to set aside the judgments of conviction and for a new trial upon newly discovered evidence. The motion was made

while his appeal from the judgments of conviction was pending in the Circuit Court of Appeals for the Second Circuit, but after the expiration of the term of the District Court at which said judgments were entered. The District Court on consent of the United States Attorney heard the application on the merits and held that the defendant had not had a fair trial because of bias which one of the jurors entertained against the defendant and which he had concealed on his examination on the *voir dire*. The Chief Justice, then Mr. Justice Hughes, writing for a unanimous court, in answering questions certified by the Circuit Court of Appeals on rule to show cause why prohibition should not issue, held that as the judgment term had expired the District Court was without jurisdiction to vacate the judgments of conviction and to grant a new trial, saying (p. 67):

> "In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term * * * ."

This Court pointed out that, although a certain correctional jurisdiction remains in the District Court after the expiration of the term, such jurisdiction is of limited scope and does not embrace the power to grant a new trial on newly discovered evidence, saying (p. 69):

> "This jurisdiction was of limited scope; the power of the Court thus to vacate its judgment for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself

irregular and invalid. *In cases of* prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors and *newly discovered evidence,* as well as where it is sought to have the court in which the case was tried reconsider its rulings, *the remedy is by a motion for a new trial* (Jud. Code, Sec. 269) —*an application which* is addressed to the sound discretion of the trial court, and, *in accordance with the established principles which have been repeatedly set forth in the decisions of this Court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered.*" (Italics ours.)

The foregoing salutary principles were again applied by this Court in the comparatively recent case of *Delaware, Lackawanna & Western R. R. Co.* v. *Rellstab,* 276 U. S. 1. There the District Court of New Jersey, after its judgment had been affirmed by the Circuit Court of Appeals, and after the expiration of the judgment term, vacated its own judgment and granted a new trial upon the ground of perjured testimony. Mr. Justice Holmes, writing for a unanimous court, in holding the District Court to be without jurisdiction to vacate its judgment said (p. 4):

"However strong may have been the convictions of the District Judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. *The power of the Court to set aside its judgment on this ground ended with the term.*" (Italics ours.)

No claim is or could be made by petitioner that the case at bar comes within any of the exceptions referred to in *United States* v. *Mayer* whereby a

limited jurisdiction in the District Court obtains for the purpose of correcting inaccuracies in matters of form or clerical errors and in civil cases to rectify such mistakes of fact as were reviewable on writs of error *coram nobis* or *coram vobis*. Nor are we here concerned with the question whether the petitioner is entitled to relief by way of a bill of review in equity. The decision of the Circuit Court of Appeals herein that the District Court lacked power to set aside its own judgment and grant a new trial after the expiration of the judgment term, was in strict "accordance with established principles repeatedly set forth in the decisions of this Court" that "in cases of * * * newly discovered evidence * * * the remedy is by a motion for a new trial * * * an application which * * * cannot be entertained in the absence of a different statutory rule after the expiration of the term at which the judgment was entered" (*United States* v. *Mayer, supra*).

II.

The pendency in the Circuit Court of Appeals of petitioner's appeal from the judgment did not authorize the Circuit Court of Appeals to remand the case to permit the District Court to vacate its own judgment and grant petitioner's motion for a new trial after the expiration of the term of the District Court at which said judgment was entered.

Petitioner contends that because of the pendency of its appeal in the Circuit Court of Appeals, that court, without reversing or modifying the judgment, and indeed, in the face of its af-

firmance of the judgment, could properly remand the cause at the District Court's request so that the District Court could vacate its own judgment and grant a new trial upon newly discovered evidence although the judgment term had expired. Such contention, we submit, is unsound both on principle and authority. The Circuit Court of Appeals, like the District Court, is a court created by statute. It has no original jurisdiction, but only such jurisdiction as is conferred upon it which is exclusively appellate. (*Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer,* 235 U. S. 55; *Frankel* v. *Woodrough,* 7 F(2) 796; Act of March 3, 1891, Secs. 2, 6, 26 Stat. L. 826, 828.) Being an appellate court exclusively, the jurisdiction of the Circuit Court of Appeals in respect of cases pending before it on appeal is restricted to the correction of errors committed in the proceedings before the Trial Court, and which are preserved for review by the record.

The Circuit Court of Appeals concededly may not grant a motion for a new trial on newly discovered evidence, and by its order of remand of June 28, 1930 did not purport to do so. Its sole authority is to affirm, reverse or modify the judgment appealed from. Finding no error in the record herein, the Circuit Court of Appeals had affirmed plaintiff's judgment in its *per curiam* opinion of January 15, 1930. As Circuit Judge Woolley appropriately observed below (R., p. 73) this case "is not the ordinary case of a new trial awarded after a judgment has been reversed. Here the judgment had been affirmed and with the affirmance still in force a new trial was ordered*."

*No proceedings were taken under the District Court's order pending the disposition of plaintiff's appeal therefrom.

The order of remand, therefore, was not an order or decree giving effect to a judgment of the Circuit Court of Appeals in the exercise of its exclusively appellate jurisdiction. On the contrary, it was an order entered at the request of the District Court—as the Circuit Court of Appeals itself expressed it: "To give the District Court a free hand"—and at most merely permitted the District Court to grant a new trial if it had jurisdiction to do so. As the judgment in plaintiff's favor had not been reversed or modified by mandate of the Circuit Court of Appeals, and as the order of the Circuit Court of Appeals dismissing the appeal "without prejudice" did not disturb the judgment in plaintiff's favor, it is clear that said order did not vest in the District Court jurisdiction to set aside its own judgment and grant a new trial after the expiration of the judgment term. The District Court being without jurisdiction to grant a new trial, the permissive order of remand manifestly could not confer jurisdiction upon the District Court and should not have been granted. The Circuit Court of Appeals was therefore clearly right in making the second order complained of, which granted plaintiff's motion and vacated said order of remand.

The decision below in this respect is not only sound on principle, but in strict conformity with the applicable decisions of this Court. Thus in *United States* v. *Mayer, supra,* this Court's decision that the District Court, after the judgment term, could not grant a new trial on newly discovered evidence *was made in respect of a criminal case in which an appeal was at that time pending in the Circuit Court of Appeals for the Second Circuit.* While leave had not there been obtained

from the Circuit Court of Appeals to apply to the District Court for a new trial, the holding that the District Court was without jurisdiction to entertain such an application was based, not upon any such technical consideration, but upon the fundamental consideration of lack of power of the District Court to alter its judgments after expiration of the term of the court at which they are rendered.

This Court's decision in *United States* v. *Mayer*, involved the liberty of a human being who had been sentenced to imprisonment as a result of what was held by the District Judge to have been an unfair trial, and if, in accordance with petitioner's contention, relief could have been afforded the defendant therein by the simple expedient of a permissive order from the Circuit Court of Appeals remanding the cause for that purpose, it is inconceivable that this Court would have held the District Court to be without jurisdiction. If such a permissive order of remand could revive jurisdiction in the District Court or confer upon it a new or special jurisdiction to grant a new trial on newly discovered evidence after the judgment term, this Court manifestly would have said so in its exhaustive opinion, inasmuch as the appeal was still pending in the Circuit Court of Appeals.*

In *Roemer* v. *Simon*, 91 U. S. 149, while the case was pending upon appeal before this Court, appel-

*One of the questions certified by the Circuit Court of Appeals and answered by this Court in the negative, reads as follows: "Question II. When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which the judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?"

lant, upon motion, requested this court to set aside the final decree of the Circuit Court and grant a rehearing on newly discovered evidence. This Court denied appellant's motion, holding that its sole power was to "affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause." Mr. Chief Justice Waite, in writing for a unanimous court, set forth the proper practice for such a rehearing, *in cases where the term of the trial court has not expired,* but held that inasmuch as the term of the Circuit Court in that case had expired, the case could not be remanded by this Court for rehearing, saying:

> "It is clear that after an appeal in equity to this court we cannot, upon motion, set aside a decree of the court below and grant a rehearing. We can only affirm, reverse or modify the decree appealed from; and that upon the hearing of the cause. No new evidence can be received here. (Rev. St., Sec. 698). The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule 88. *It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed*". (Italics ours.)

The decisions of the Circuit Courts of Appeals are of similar import. In *Strand* v. *Griffith,* (C. C. A. 9) 135 F. 739, the Court denied appellant's motion for leave to dismiss the appeal and to remand the cause to the lower court "with directions to said court to allow requested amendments to the bill of complaint to be made," holding, on authority of *Roemer* v. *Simon, supra,* that it was without power to grant the relief requested, the term of the court below having expired.

In *Marden* v. *Campbell P. & Mfg. Co.*, (C. C. A. 1) 67 Fed. 809, the court said (p. 811):

> "The defendants in the court below have filed two motions in this court, which we have considered. The first is that the cause be remanded to the circuit court 'for the purpose of rehearing of the said cause,' having reference undoubtedly to the new matter presented to the circuit court, to which we have referred. *This court, however, has no power to remand except for the purpose of giving effect to some judgment of its own. Roemer* v. *Simon*, 91 U. S. 149; *Smith* v. *Weeks*, 3 C. C. A. 644; 53 Fed. 758. This is so essential by fundamental rules of practice that it need only be stated. *To remand under any other circumstances would necessarily operate as a dismissal.*" (Italics ours.)

As the decree there appealed from was interlocutory, appellants were permitted to dismiss the appeal without prejudice to further proceedings in the Circuit Court, which then clearly had jurisdiction of the cause.

In *Baltimore S. S. Co.* v. *Phillips*, 9 Fed. (2) 902, the Circuit Court of Appeals for the Second Circuit upheld the right of the District Court to vacate a prior judgment from which an appeal had been taken *where the term of the District Court had not expired* and the cause had been remanded by the Circuit Court of Appeals at the request of the District Court for its further consideration. Referring to this Court's decision in *Roemer* v. *Simon, supra*, the Circuit Court of Appeals said (p. 903):

> "The decree appealed from was final and the term had expired, for which reason the court denied the motion, as *the Circuit Court*

> *could have done nothing in the cause after remittitur.* But they laid down the proper practice, if the term had been open, which is for the appellant to apply to the lower court to reopen the decree, and for that court to request the upper court to remit.' (Italics ours.)

Petitioner cites no case wherein this Court, or any Circuit Court of Appeals, remanded a case pending before it on appeal to permit the lower court to grant a new trial on newly discovered evidence after the expiration of the judgment term. The cases of *Angle* v. *United States,* (C. C. A. 4), 162 Fed. 264 and *Martin* v. *United States,* (C. C. A. 5), 17 F(2d) 972, relied upon by petitioner as being in conflict with the decision reached herein, are cases in which applications for new trials were *denied,* while in *Scott* v. *United States,* (C. C. A. 5), 165 Fed. 172, the Circuit Court of Appeals, in authorizing the trial court to modify its sentence in a criminal cause, based its action upon the consent of the Government. Although the opinions indicate that the courts assumed such power to exist, the statements in regard thereto may be regarded as *dicta,* inasmuch as the question of jurisdiction does not appear to have been mooted and the applications were in fact denied. Whether or not the quotations relied upon by petitioner, may be regarded as more than *dicta,* they are clearly in conflict with the decisions of this Court hereinabove referred to, and thus afford no ground for contention that the decision of the Circuit Court of Appeals herein, which followed the applicable decisions of this Court, has created a conflict with decisions of other Circuit Courts of Appeals,

1930. The decision of the court was without prejudice to petitioner's right to seek relief by bill of review in equity (R., p. 75).

Petitioner, while praying for a review of both orders of the Circuit Court of Appeals of July 6, 1931 (Petition, pp. 1, 7), in its brief questions solely the propriety of the Circuit Court of Appeals' order, vacating its own prior order of remand, and in its petition (p. 5) fails to assign as error the action of the Circuit Court of Appeals in making its order reversing the order of the District Court which purported to vacate plaintiff's judgment and grant a new trial after the expiration of the term.

It should be noted that the order of the Circuit Court of Appeals vacating its order of remand of June 28, 1930 was entered on plaintiff's motion seasonably made, which motion was continued by orders of the Circuit Court of Appeals to the March Term 1931, when it was heard along with the argument of plaintiff's appeal from the District Court's order vacating the judgment and granting a new trial. While plaintiff's petition and other papers on which the Circuit Court of Appeals made its order of July 6, 1931, vacating its order of remand, do not appear either in the transcript of record on plaintiff's appeal or in the record on the principal appeal printed as an Appendix thereto, the matters in connection therewith, we believe, are sufficiently set forth in the opinion of the Circuit Court of Appeals.*

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*Note: Docket entries appearing in the transcript of record on the prior appeal (Appendix R. 1-3) do not include docket entries in the cause since the case has been pending in the Circuit Court of Appeals. Pertinent docket entries in the prior appeal subsequent to June 21, 1930, the date of the last docket entry appearing in the transcript of record on the prior appeal, (Appendix) as furnished us by the Clerk of the Circuit Court of Appeals, are set forth infra in an appendix to this brief.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals that the District Court of Delaware had no jurisdiction to vacate and set aside, on June 30, 1930, the judgment in plaintiff's favor entered May 11, 1929 during the March Term 1929 of said District Court, was clearly correct and in strict conformity with the applicable decisions of this Court.

It is a fundamental principle, thoroughly established by repeated decisions of this Court, that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless a proceeding for that purpose was begun during the term, or the term was for that purpose extended under general or special rule. *Hudson* v. *Guestier*, 7 Cranch, 1; *Cameron* v. *M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald*, 12 Pet. 488; *Bank of United States* v. *Moss*, 6 How. 31, 38; *Bronson* v. *Schulten*, 104 U. S. 410, 415-417; *Phillips* v. *Negley*, 117 U. S. 665, 673, 674; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Hume* v. *Bowie*, 148 U. S. 245, 255; *Tubman* v. *B. & O. R. R. Co.*, 190 U. S. 38; *Wetmore* v. *Karrick*, 205 U. S. 141, 149-152; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 321; *United States* v. *Mayer*, 235 U. S. 55; *D. L. & W. R. R. Co.* v. *Rellstab*, 276 U. S. 1.

In *Phillips* v. *Negley*, 117 U. S. 665, this Court reversed an order of the Supreme Court of the District of Columbia which had set aside a default

trial to a separable issue is in no wise involved herein. The Circuit Court of Appeals did not grant a new trial; it did not disturb the District Court's judgment. It had found no error and affirmed the judgment in a *per curiam* opinion and by its order of affirmance entered January 15, 1930. Furthermore, as shown by the court's opinion (R., p. 75) it has adhered to its views on the law of the case by denying, simultaneously with its decision herein, the petition for rehearing which had been filed by defendant and which had remained undecided when its order of remand was made. The case of *Gasoline Products Co.* v. *Champlin Refining Co.* is not apposite here, inasmuch as the question of the scope of a retrial is pertinent only where a new trial has been ordered by the appellate court for errors appearing in the record and, therefore, affords no basis for the issuance of a writ of certiorari herein.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

September, 1931.

ROBERT H. RICHARDS,
AARON FINGER,
CARL EHLERMANN,
THOMAS J. CRAWFORD,
Attorneys for Respondent.

APPENDIX.

The docket entries in the Circuit Court of Appeals, on petitioner's appeal from the judgment in plaintiff's favor, subsequent to June 27, 1929, the date of the last docket entry appearing in the Appendix to the Transcript of record on this appeal, as furnished us by the Clerk of the Circuit Court of Appeals, include, among other entries, the following:

1930

Jan. 15—Opinion *per curiam* filed;
Order affirming decree filed;

Feb. 3—Petition for rehearing filed;

Mar. 5—Petition to remand case to District Court for taking further evidence filed;
Argued on petition to remand, *Coram:* Woolley, Davis and Johnson, JJ;

" 11—Memorandum in support of Motion to remand case filed;
Memorandum for appellee in opposition to petition to remand case filed;

" 26—Order staying proceedings pending petition to District Court filed;

June 26—Certified copy of request of District Court to remand case to their court filed;

" 28—Exceptions to order of March 26, 1930 filed;
Order dismissing appeal and remanding case to District Court filed;

Oct. 2—Petition for rule to show cause filed;
Order allowing petition to be filed and argument to be had at October Term filed.

1931

Jan. 10—Stipulation to continue case filed;

" 13—Order to continue case to March Term, 1931 filed;

Feb. 16—Transfer to printed calendar;

Mar. 31—Argued—*Coram:* Buffington, Woolley & Davis, JJ;
Notice of argument of motion filed;

Apr. 11—Brief in support of motion filed;

July 6—Order vacating order of June 28, 1930, dismissing appeal filed;
Order denying petition for rehearing filed;

" 23—Order staying mandate filed in No. 4506.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 314.

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

ROBERT H. RICHARDS,
AARON FINGER,
CARL EHLERMANN,
THOMAS J. CRAWFORD,
Attorneys for Respondent.

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within the purview of Rule 38(5) (b) of the Rules of this Court.

There is no basis for petitioner's contention (Brief, pp. 13-15) that Section 701 of the Revised Statutes (Title 28, Sec. 876, U. S. C. A.) sanctioned the order of remand which the Circuit Court of Appeals has itself since vacated. The provision that the appellate court "may direct such judgment or order to be rendered or such further proceedings to be had by the inferior court, as the justice of the case may require" is a power incidental to and dependent upon the exercise of the appellate power to "affirm, reverse or modify" judgments as therein provided.

This is clear from this Court's decision in *Ballew* v. *United States*, 160 U. S. 187, upon which petitioner relies (Brief, p. 14). There a judgment of conviction based upon a general verdict of guilty after trial of an indictment containing two counts, was *reversed* by this Court because of certain errors committed by the lower court. As the errors in question related solely to the crime charged by the first count of the indictment, this Court held that on reversing the general judgment for errors found in the record, it had power, under Section 701 R. S., to remand the cause with instructions to the lower court to enter judgment of conviction on the second count (as to which no error was found), and for such proceedings as to the first count as would be in conformity to law.

Thus the decision herein is clearly not in conflict with the *Ballew* case. Said case affords no basis for contending that under Section 701 R. S. a federal appellate court may remand a case to the court below and thereby confer upon the

lower court jurisdiction to vacate its own judgment and grant a new trial after the judgment term. If such power existed it would manifestly have been exercised by this Court *sua sponte* in such cases as *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 298; *O'Connell* v. *United States*, 253 U. S. 142, 146 and *Exporters* v. *Butterworth-Judson Co.*, 258 U. S. 365 holding a Trial Court to be without power after the expiration of the term, at which final judgment was entered, to settle and sign a bill of exceptions, so essential to a review on the merits by a federal appellate court of final judgments in common law cases.

III.

The question whether the issue of the quantum of plaintiff's damages is a separable issue is not material here, inasmuch as the Circuit Court of Appeals did not reverse the judgment and grant a new trial for errors committed below, said judgment having been vacated by the District Court itself when it had no jurisdiction over the cause.

Petitioner contends (Petition, p. 6; Brief, pp. 17-20) that the Circuit Court of Appeals had power to authorize a new trial on the issue of the quantum of plaintiff's damages which, it is contended, presents a separable issue within the purview of this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494. Whether or not this is so is not material here, inasmuch as the question of the power of the Circuit Court of Appeals, upon reversal of judgment for errors committed below, to restrict the new

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 314.

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R., 54-59) is officially reported in 51 Fed. 642-644.

Jurisdiction.

This case comes before this Court on writ of certiorari to the Circuit Court of Appeals for the Third Circuit which was granted by this court on October 19, 1931 (R.,

223) under the provisions of Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925, now Section 347-a of Title 28, United States Code Annotated.

Statement of Case.

On this writ petitioner (defendant below) seeks the reversal of two orders of the Circuit Court of Appeals entered herein on July 6, 1931. By one of said orders (R., 59), the Circuit Court of Appeals reversed an order of the District Court of Delaware (R., 48), entered June 30, 1930, whereby said District Court, at its June term, 1930, purported to set aside its own judgment, entered in favor of respondent (plaintiff below) on May 11, 1929 (R., 2) at the March term, 1929 of said court, and to grant petitioner's motion for a new trial "for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (R., 48). For convenience we shall refer to the parties as they were below.

By the second of said orders (R., 212) the Circuit Court of Appeals, on plaintiff's motion, vacated its own *per curiam* order which it had previously entered at the request of the District Court (R., 45-46) on June 28, 1930, whereby it dismissed defendant's appeal "without prejudice" and had remanded the cause "to give the District Court a free hand" (R., 58) to grant a new trial.

The action, which was one at law to recover damages for defendant's breach of its written contract employing plaintiff as its President for a term of years, was tried by the Court without the intervention of a jury and resulted in a judgment in plaintiff's favor for $80,500. The District Court held that the contract was valid, that it had been breached by defendant's wrongful discharge of plaintiff and that plaintiff was entitled to damages at the rate of $25,000 per year in accordance with the terms of the contract for the three years covered by the breach,

less a sum of $4,500. in mitigation, which the Court held represented compensation to plaintiff for personal services rendered by him in connection with a joint speculative venture upon which he had embarked after his wrongful discharge (R., 203-4). The Court further held that plaintiff was entitled to the return of $10,000. which he had voluntarily left with defendant out of his first year's salary, to await payment of dividends on defendant's common stock, making plaintiff's total recovery $80,500. (R., 204-5) for which judgment was entered on May 11, 1929 at the March term, 1929 of said District Court.

Said judgment, which the District Court purported to set aside at its June term, 1930, was in all respects a final judgment and had been affirmed by the Circuit Court of Appeals on January 15, 1930 (R., 212; Docket Entries, 214). After affirmance, and prior to the issuance of the mandate, and while defendant's petition for rehearing was pending undetermined, the Circuit Court of Appeals, on defendant's petition (R., 3-11), granted defendant leave to apply to the District Court to have that court request the Circuit Court of Appeals to remand the cause so that the District Court could vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment. The order of the Circuit Court of Appeals provided that further proceedings in the cause in that Court be stayed until after the District Court had heard defendant's motion, and, if allowed, until it should have finally acted upon the matters raised thereby (R., 11-12).

Defendant thereupon filed its motion in the District Court for a new trial on alleged newly discovered evidence (R., 12-24). Plaintiff opposed the same on the merits (R., 24-43). On June 23, 1930 the District Court made an order (R. 44) requesting the Circuit Court of Appeals to dismiss defendant's appeal "without prejudice" and to remand the cause to the District Court

to the end that the District Court might vacate its own judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment. A certified copy of said request order was filed with the Clerk of the Circuit Court of Appeals on June 26, 1930 (Docket Entries, R., 215), and on June 28, 1930, on defendant's application, Circuit Judge Buffington, who was not a member of the court which had decided the appeal, signed a *per curiam* order dismissing defendant's appeal "without prejudice" (although said appeal had been determined and the judgment of the District Court affirmed) and remanding the cause as requested by the District Court (R., 45-46).

On June 30, 1930, the next court day following the granting of said *per curiam* order of remand, a certified copy of said order was filed in the District Court (R., 45), and on the same day defendant, over plaintiff's objection and exceptions (R., 46-49) obtained from the District Court an order (R. 48) vacating the District Court's own judgment in plaintiff's favor entered May 11, 1929 at the March term, 1929 of said District Court and granting defendant's motion for a new trial as to the quantum of the judgment (R., 48-49).

Thereafter plaintiff appealed from said order of the District Court which purported to vacate the judgment and grant a new trial, assigning as error that the District Court was without jurisdiction to vacate said judgment after the expiration of the judgment term (R., 50-52); and prior to the expiration of the March term, 1930, at which the Circuit Court of Appeals made its order of remand, plaintiff filed a petition, (R., 217-221) with leave of court (R., 221) requesting the Circuit Court of Appeals to vacate its *per curiam* order of remand and to release its mandate affirming the judgment in accordance with the order of affirmance theretofore entered in the cause on January 15, 1930. Plaintiff's motion and appeal

were argued simultaneously and resulted in the two orders of July 6, 1931 above mentioned, which are challenged by defendant on this writ.

The Circuit Court of Appeals, in entering the orders complained of, filed a reasoned opinion (R., 54-59) holding that the District Court of Delaware was without jurisdiction at its June term 1930 to vacate its own judgment in plaintiff's favor entered May 11, 1929 at the March term, 1929 of said court and to grant defendant's motion for a new trial upon newly discovered evidence, and further, that by its order of remand of June 28, 1930 the Circuit Court of Appeals was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term" (R., 57). It, therefore, held that the order of the District Court vacating the judgment should be reversed and that its own order of remand should be vacated; it denied defendant's petition for a rehearing, which had been pending undetermined at the time of the entry of the order of remand, and directed the release of the mandate of affirmance in accordance with its order of affirmance of January 15, 1930 on defendant's appeal from the judgment (R., 58). The decision of the Circuit Court of Appeals herein reviewed was "without prejudice to defendant's right to seek relief by a bill of review in equity" (R., 59).

No question is raised by defendant as to the propriety of the rulings of the Circuit Court of Appeals on the first appeal, as to the validity of the contract and the measure of plaintiff's damages. The sole question raised on this writ involves the correctness of that court's ruling that the District Court was without jurisdiction to vacate its own judgment after the expiration of the judgment term and that its own order of remand did not vest in the District Court jurisdiction to grant defendant's motion for a new trial on newly discovered evidence after the expiration of the judgment term.

The inaccuracy in plaintiff's testimony, upon which defendant based its motion for a new trial had to do with the amount of plaintiff's capital contribution to a joint speculative venture upon which he had embarked with another after his wrongful discharge (R., 16, 21). Plaintiff testified on cross-examination that the arrangement provided for equal contributions of capital by himself and his co-adventurer (R., 144) and that out of the profits, if any were made, he was to receive preferential payment of $1,000. a month, the balance of the profits to be divided equally between them (R., 136, 143). The trial court held that as plaintiff was entitled to salary which required no capital investment and which was income of a non-speculative nature, the profits derived by plaintiff from said speculative venture which represented a return on his capital investment were not to be considered in mitigation of plaintiff's damages (R., 203-204) and excluded testimony as to the amount of such profits (R., 128, 130, 135, 166). The court held, however, that one-half of the sum of $9,000. which was paid to plaintiff out of profits in advance of an equal division of the balance of profits, arose not from plaintiff's speculation with his own capital, but from his services in managing the one-half interest of his co-adventurer, and hence was properly to be considered in mitigation as compensation for his services (R., 204). Plaintiff's testimony was inaccurate in that, under the arrangement, his capital contribution instead of being one-half, was one-fourth (R., 35). Defendant's application for a new trial was based upon this inaccuracy in plaintiff's testimony on the theory that plaintiff's damages should be further mitigated by an additional one-fourth of the distributive profits as representing payment for services rather than a return on plaintiff's capital.

Aside from the question of jurisdiction, as plaintiff contended below defendant's application does not come within the rule of "newly discovered evidence" as de-

fined by the authorities. While plaintiff himself testified that his capital contribution to the joint speculative account was one-half (R., 144), the record clearly shows that plaintiff was testifying as to recollection only. Thus, as to whether the capital of the joint venture was contributed in equal shares, he said "Without looking at the books, that would certainly be my impression." (R., 145.) Plaintiff further stated that he did not *think* that some of the stocks had been carried on the credit of his co-adventurer alone (R., 145), and that *as far as he recalled it,* the amount of his capital was at all times sufficient to take up one-half of the amount necessary for the operations (R., 144).

That plaintiff was not endeavoring to misstate the facts but was giving his best recollection as to the terms and operation of the joint speculative account, is shown not only by the above but by the fact that plaintiff himself volunteered the information that the arrangement "was all covered on a half sheet of typewriting" (R., 136). Thus, with notice that the arrangement was in writing and that plaintiff was testifying as to his recollection only, defendant deliberately chose to accept plaintiff's recollection and impressions rather than require the production of the agreement or the books. The case was being tried by the court without a jury and the contract and books could easily have been produced upon a brief adjournment. Moreover, one of defendant's officers who testified upon the trial (R., 180), admitted later that he "had always questioned Mr. Montgomery's testimony at some points concerning Palmer & Company", plaintiff's co-adventurer (R., 32), yet defendant did nothing with regard to investigating the amount of plaintiff's capital contribution during the time the case was pending before the District Court for decision on briefs, nor indeed until after the Circuit Court of Appeals had affirmed the judgment of the District Court in plaintiff's favor.

ARGUMENT.

POINT I.

As the March Term 1929 of the District Court of Delaware, during which term the judgment in plaintiff's favor was entered, had long since expired, the said District Court on June 30, 1930 was without jurisdiction to vacate and set aside its own judgment in plaintiff's favor entered May 11, 1929, and the Circuit Court of Appeals was clearly right in so holding.

It is a fundamental principle, thoroughly established by repeated decisions of this Court, that a federal court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless a proceeding for that purpose was begun during the term, or the term was for that purpose extended under general or special rule. (*Hudson* v. *Gustier*, 7 Cranch, 1; *Cameron* v. *M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald*, 12 Pet. 488; *Bank of United States* v. *Moss*, 6 How. 31, 38; *Bronson* v. *Schulten*, 104 U. S. 410, 415-417; *Phillips* v. *Negley*, 117 U. S. 665, 673, 674; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Hume* v. *Bowie*, 148 U. S. 245, 255; *Tubman* v. *B. & O. R. R. Co.*, 190 U. S. 38; *Wetmore* v. *Karrick*, 205 U. S. 141, 149-152; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 321; *United States* v. *Mayer*, 235 U. S. 55; *Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70; *D. L. & W. R. R. Co.* v. *Rellstab*, 276 U. S. 1; *United States* v. *Benz*, 282 U. S. 304, 306; *Baltimore S. S. Co.* v. *Phillips* (C. C. A. 2) 9 F. (2d) 932; *Greyerbiehl* v. *Hughes Electric Co.*, (C. C. A. 8) 294 Fed. 802; *United States* v. *Luvisch* (D. C.) 17 F. (2d) 200; *United States* v. *Gridley*, (D. C.) 49 F. (2d) 908; *Hart, et al* v. *Wiltsee*, (C. C. A. 1) 25 F. (2d) 863.)

The statutory provisions creating the various district courts of the United States and prescribing the terms thereof, are set forth in the United States Judicial Code. Section 75 of the Judicial Code (now Section 148 of Title 28, United States Codes Annotated), provides that

> "The State of Delaware shall constitute one judicial district, to be known as the district of Delaware. The terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September and December."

It is undisputed that the judgment in plaintiff's favor, which the order of the District Court purported to vacate and set aside, was dated May 1, 1929 and was entered in the District Court of Delaware on May 11, 1929, which was during the March Term, 1929 of said District Court. The judgment was one rendered in a civil suit at common law, and was in all respects a final judgment. The judgment was, of course, subject to review for errors of law committed by the trial court, but, as we have seen, upon consideration of defendant's appeal from said judgment (R., 208-210), the Circuit Court of Appeals found no error, and on January 15, 1930 affirmed the judgment "on the findings made by Judge Morris and on his reasoning in entering the verdict" (R., 212, 214). The subsequent order of June 28, 1930 dismissing defendant's appeal "without prejudice" in no way disturbed the judgment appealed from and remanded the cause to the District Court with the District Court's judgment unimpaired. When, therefore, the District Court made its order of June 30, 1930, from which plaintiff appealed, it purported to vacate and set aside its own judgment long after the judgment term had expired.

The foregoing authorities clearly establish that a federal District Court may not set aside or alter its own final judgment after the expiration of the term at which it was entered unless proceedings to that end are in-

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stituted before the term has expired. This court, in *Bronson* v. *Schulten*, supra, while holding that all judgments, decrees or other orders of the federal courts, however conclusive they may be, are under the control of the court during the term at which they are pronounced, said (p. 415):

> "it is a rule equally well established, that after the term has ended, all final judgments and decrees of the court pass beyond its control unless steps be taken during that Term, by motion or otherwise to set aside, modify or correct them * * * So strongly has this principle been upheld by this court that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the Term at which the judgment was rendered, and this is placed upon the ground that the case has passed beyond the control of the court."

Similarly in *Sibbald* v. *United States*, 12 Pet. 488, one of the earlier cases of this court, considering the question of the jurisdiction of federal courts over their own judgments, it was held (p. 492):

> "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (3 Wheat. 591; 3 Peters, 431), or to reinstate a cause dismissed by mistake (12 Wheat., 10); from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error, *coram vobis*, at law, are exceptions which cannot affect the present motion."

In *Phillips* v. *Negley*, 117 U. S. 665, this Court reversed an order of the Supreme Court of the District of

Columbia which had set aside a default judgment after the expiration of the judgment term and had granted a new trial upon the ground of alleged "irregularity, surprise, fraud and deceit in the procurement of said verdict and judgment". This Court said in part (p. 679):

> "We * * * are of opinion, and so decide, that, after the term at which they were rendered, the power of the court over the parties and over its record remains only in the excepted cases already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief."

In *United States* v. *Mayer, supra,* 235 U. S. 55, which the Circuit Court of Appeals held rules the case at bar, a defendant, who after trial had been convicted in a criminal cause on five indictments for violations of the statutes relating to the use of the mails and for a conspiracy, moved in the District Court to set aside the judgments of conviction and for a new trial upon newly discovered evidence. The motion was made while his writ of error to review the judgments of conviction was pending in the Circuit Court of Appeals for the Second Circuit but after the expiration of the term of the District Court at which said judgments were rendered. The District Court of its own motion raised the question of its jurisdiction to entertain an application for a new trial in view of the expiry of the judgment term. The United States Attorney thereupon consented to a hearing of the application on the merits. The Court held that the defendant had not had a fair trial by an impartial jury because one of the jurors concealed a bias against the defendant on his examination on the *voir dire*, that neither defendant nor his counsel had knowledge of the facts upon which the motion for

a new trial was based until after the conclusion of the trial and after the expiration of the term, and that the facts could not have been discovered earlier by the exercise of reasonable diligence. The court granted the defendant a new trial, but withheld the entry of the order to permit the question of jurisdiction to be reviewed. Thereupon a writ of prohibition was applied for in the Circuit Court of Appeals for the Second Circuit and upon the return of the rule to show cause, the question of the jurisdiction of the District Court to vacate the judgments of conviction after the expiration of the judgment term was certified to this Court. The Chief Justice, then Mr. Justice Hughes, in speaking for a unanimous Court, held that as the judgment term of the District Court had expired, that court was without jurisdiction to vacate the judgments of conviction and to grant a new trial, saying (p. 67):

> "In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term * * *."

This Court pointed out that, although a certain correctional jurisdiction remains in the District Court after the expiration of the term, such jurisdiction is of limited scope and does not embrace the power to grant a new trial on newly discovered evidence, saying (p. 69):

> "This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid. *In cases of* prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and *newly discovered evidence*, as well as where it is sought

> to have the court in which the case was tried reconsider its rulings, *the remedy is by a motion for a new trial* (Jud. Code, Sec. 269)—*an application which* is addressed to the sound discretion of the trial court, and, *in accordance with the established principles which have been repeatedly set forth in the decisions of this court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered.*" (Italics ours.)

The principle that a district court after the expiration of the judgment term lacks power to set aside the judgment and to grant a new trial was reaffirmed and reapplied by this court in the comparatively recent case of *D. L & W. R. R. Co.* v. *Rellstab*, 276 U. S. 1. There the District Court of New Jersey, after its judgment had been affirmed by the Circuit Court of Appeals, and after the expiration of the judgment term, vacated its own judgment and granted a new trial upon the ground of perjured testimony. Mr. Justice Holmes, writing for a unanimous court, in holding the District Court to be without jurisdiction to vacate its judgment, said (p. 4):

> "However strong may have been the convictions of the District Judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. *The power of the Court to set aside its judgment on this ground ended with the term.*" (Italics ours.)

No claim is or could be made by defendant that the case at bar comes within any of the exceptions recognized by the foregoing authorities whereby a limited correctional jurisdiction is retained by the District Court, nor are we here concerned with the question as to whether defendant is entitled to relief by way of a bill of review in equity. The decision of the Circuit Court of Appeals,

here challenged, that the District Court lacked power to set aside its own judgment and to grant a new trial on newly discovered evidence after the expiration of the judgment term was in strict "accordance with the established principles which have been repeatedly set forth in the decisions of this court" holding that such an application "cannot be entertained in the absence of a different *statutory* rule after the expiration of the term at which the judgment was entered." *United States* v. *Mayer, supra,* at p. 69.

POINT II.

The pendency in the Circuit Court of Appeals of defendant's appeal from the judgment in plaintiff's favor, did not authorize the Circuit Court of Appeals to remand the case to permit the District Court to grant petitioner's motion for a new trial and to vacate its own judgment after the expiration of the judgment term.

Defendant contends that because of the pendency of its appeal in the Circuit Court of Appeals, that court could properly remand the cause at the District Court's request so that the District Court could vacate its own judgment and grant a new trial upon newly discovered evidence although the judgment term had expired. Such contention, we submit, is unsound both on principle and authority. The Circuit Court of Appeals, like the District Court, is a court created by statute. It has no original jurisdiction, but only such jurisdiction as is conferred upon it which is exclusively appellate. (*Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer, supra; Frankel* v. *Woodrough,* 7 F. (3d) 796; Act of March 3, 1891, Secs. 2, 6, 26 Stat. L. 826, 828.)

The Circuit Court of Appeals concededly may not grant a motion for a new trial on newly discovered evi-

dence, and by its order of remand of June 28, 1930 did not purport to do so. Its sole authority is to exercise its appellate jurisdiction and to affirm, reverse or modify the judgment appealed from. Finding no error in the record herein, the Circuit Court of Appeals had affirmed plaintiff's judgment in its *per curiam* opinion of January 15, 1930. As Circuit Judge Woolley appropriately observed below (R., 73) this case "is not the ordinary case of a new trial awarded after a judgment has been reversed. Here the judgment has been affirmed and with the affirmance still in force a new trial was ordered."

The order of remand, therefore, was not an order or decree giving effect to a judgment of the Circuit Court of Appeals in the exercise of its appellate jurisdiction. On the contrary, it was an order entered at the request of the District Court—as the Circuit Court of Appeals itself expressed it: "To give the District Court a free hand"—and at most merely permitted the District Court to grant a new trial if it had jurisdiction to do so. The jurisdiction of the District Court being statutory, the order dismissing defendant's appeal without prejudice and remanding the cause did not revive the jurisdiction of the District Court which had expired with the judgment term, nor did it create a new or hybrid jurisdiction whereby said District Court after expiration of the judgment term could grant a motion for a new trial on newly discovered evidence. The District Court being without jurisdiction, the Circuit Court of Appeals was clearly right in making its second order, hereby complained of, which granted plaintiff's motion and vacated said *per curiam* order of remand.

The ruling of the Circuit Court of Appeals (R. 57) that it was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term" is in conformity with the applicable decisions of this court.

Thus the decision of this Court in *United States* v. *Mayer, supra,* that in cases of newly discovered evidence the remedy is by motion for a new trial which cannot be entertained by the District Court, in the absence of a different *statutory* rule, after the expiration of the judgment term, was made in respect of a criminal case which was at that time pending on writ of error in the Circuit Court of Appeals for the Second Circuit. While leave to apply to the District Court for a new trial had not there been obtained from the Circuit Court of Appeals, this Court's ruling that the District Court was without jurisdiction to entertain the application, was based, not upon any such technical ground but upon the fundamental consideration of lack of power of the District Court to alter its own judgments after the expiration of the judgment term.

The decision in *United States* v. *Mayer,* involved the liberty of a defendant who had been sentenced to imprisonment as a result of what was held by the District Judge to have been an unfair trial, and if, in accordance with the contention of defendant herein, such a permissive order of remand could revive jurisdiction in the District Court or confer upon it a new or special jurisdiction to grant a new trial on newly discovered evidence after the judgment term, we believe this Court would have said so in its exhaustive opinion, inasmuch as the case was pending on appeal in the Circuit Court of Appeals.

In *Russell* v. *Southard, et al.,* 12 How. 139, 158, after the opinion of this Court was pronounced, a motion made on behalf of the appellees for a rehearing and to remand the cause to the Circuit Court "for further preparation and proof" on the ground of newly discovered evidence, was denied, Mr. Chief Justice Taney, in delivering the supplemental opinion of the Court, saying in part:

> "It is very clear that affidavits of newly discovered evidence cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record."

Similarly, in *Roemer* v. *Simon*, 91 U. S. 149, an equity case, while the case was pending on appeal before this Court, appellant, on motion, requested this Court to set aside the final decree of the Circuit Court and grant a rehearing on newly discovered evidence. This Court denied appellant's motion, holding that its sole power was to "affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause." Mr. Chief Justice Waite, in writing for a unanimous court, set forth the proper practice for such a rehearing, *in cases where the term of the trial court has not expired*, but held that inasmuch as the term of the Circuit Court in that case had expired, the case could not be remanded by this Court for rehearing, saying:

> "It is clear that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here (Rev. Stat. sec. 698). The court below cannot grant a rehearing after the term at which the final decree was rendered. Equity Rule 88. *It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed.*" (Italics ours.)

The decree was later affirmed by this Court on the original record in 95 U. S. 214.

The decisions of the Circuit Courts of Appeals are of similar import. In *Strand* v. *Griffith*, 135 Fed. 739, the Circuit Court of Appeals, Ninth Circuit, denied appellant's motion for leave to dismiss the appeal and to remand the cause to the lower court with directions to said court to allow the requested amendments to the bill of complaint to be made. The Court held on the authority of *Roemer* v. *Simon, supra*, that it was without power to grant the relief requested, the term of the court below having expired.

Similarly in *Marden* v. *Campbell P. & Mfg. Co.*, 67 Fed. 809, the Circuit Court of Appeals for the First Circuit held that the only power which a Circuit Court of Appeals has with respect to remanding a cause, is to give effect to a judgment of its own and that it cannot remand for the purpose of allowing the defeated party to have a rehearing in the trial court upon new matter. The Court said (p. 811):

> "The defendants in the court below have filed two motions in this court, which we have considered. The first is that the cause be remanded to the circuit court 'for the purpose of a rehearing of the said cause,' having reference undoubtedly to the new matter presented to the circuit court, to which we have referred. *This court, however, has no power to remand except for the purpose of giving effect to some judgment of its own. Roemer* v. *Simon*, 91 U. S. 149; *Smith* v. *Weeks*, 3 C. C. A. 644, 53 Fed. 758. This is so essential by fundamental rules of practice that it need only be stated. *To remand under any other circumstances would necessarily operate as a dismissal.*" (Italics ours.)

As the decree there appealed from was interlocutory, the Court permitted appellants to dismiss their appeal without prejudice to further proceedings in the Circuit Court, which then clearly had jurisdiction of the cause.

In *Baltimore S. S. Co.* v. *Phillips*, 9 F. (2d) 902 (reversed on other grounds 274 U. S. 316), the Circuit Court of Appeals for the Second Circuit upheld the right of the District Court to vacate a prior judgment from which an appeal had been taken, where the term of the District Court had not expired and the cause had been remanded by the Circuit Court of Appeals at the request of the District Court for its further consideration. Referring to this Court's decision in *Roemer* v. *Simon, supra*, the Circuit Court of Appeals said (p. 903):

> "The decree appealed from was final and the term had expired, for which reason the court denied the motion, *as the Circuit Court could have*

> *done nothing in the cause after remittitur.* But they laid down the proper practice, if the term had been open, which is for the appellant to apply to the lower court to reopen the decree, and for that court to request the upper court to remit." (Italics ours).

In *Hughes' Federal Practice* (1931, Vol. VIII, Sec. 5901, p. 328) the rule is stated as follows:

> "No new evidence can be received in the appellate court, and the District Court cannot grant a rehearing after the term at which the final decree was rendered. * * * Therefore, a Circuit Court of Appeals is without power to dismiss an appeal on motion of the appellant, and remand the case to the court below with directions to permit the amendment of a pleading, on a showing that facts were inadvertently omitted therefrom which were not known to the appellant until after the appeal was taken."

In *Angle* v. *United States,* 162 Fed. 264; *Davis* v. *United States,* 47 F. (2d) 1071; *Perry* v. *United States,* 39 F. (2d) 52, *Larrison* v. *United States,* 24 F. (2d) 82, and *Martin* v. *United States,* 17 F. (2d) 973 relied upon by defendant, the question of the jurisdiction of the trial court does not appear to have been mooted. In all of them the applications were denied on the merits and the courts' assumption that jurisdiction existed appears to have gone unchallenged. In *Scott* v. *United States,* 165 Fed. 172, the court in authorizing the trial court to modify its sentence in a criminal cause, based its action upon the consent of the Government. Whether or not the quotations from the opinions relied upon by defendant can be regarded as more than *dicta,* it is clear, we submit, that they are in conflict with the decisions of this Court and with "the established rule" which "embodies the policy of the law that litigation be finally terminated." *United States* v. *Mayer, supra,* p. 70. Moreover, five of the cases cite the *Angle* case as authority for the views upon which

court. As the errors in question related solely to the crime charged by the first count of the indictment, this court held that on reversing the general judgment for errors found in the record, it had power under Section 701 R. S. to remand the cause with instructions to the lower court to enter judgment of conviction on the second count, as to which no error was found, and to take such proceedings as to the first count as would be in conformity to law. Thus the decision in the *Ballew* case is not in conflict with the decision of the Circuit Court of Appeals herein, and affords no basis for contending that under Section 701 R. S. Circuit Courts of Appeals may remand a case to the trial court and thereby confer upon it jurisdiction to vacate its own judgment and grant a new trial after the judgment term.

If, as defendant contends, such power exists under Section 701 R. S., it would have been so held by this court in *United States* v. *Mayer, supra,* and also in such cases as *O'Connell* v. *United States,* 253 U. S. 142, 147, *Exporters* v. *Butterworth-Judson Co.,* 258 U. S. 365, and similar cases holding the trial court to be without power, after the expiration of the term at which final judgment is entered, to settle bills of exceptions, so essential to a review on the merits of final judgments in common law cases.

In *Exporters* v. *Butterworth-Judson Co., supra,* Mr. Justice McReynolds, in holding that consent of the parties to the settlement of a bill of exceptions after the expiration of the judgment term was wholly ineffectual, said (p. 369):

> "Consent of the parties cannot give jurisdiction to courts of the United States * * * The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties."

In *Coleman* v. *United States*, 26 F. (2d) 870, the Circuit Court of Appeals for the Eighth Circuit denied the Government's motion in a criminal case to correct an alleged error in the testimony as set forth in the bill of exceptions as settled. The court pointed out that the District Court's term had expired before the motion was filed and denied the motion, saying (p. 871):

> "This court being without power to settle a bill of exceptions originally or by amendment, and the time within which the trial court had jurisdiction so to do having expired before this motion was filed, the motion must be and it is denied."

These decisions and many decisions of similar import were all pronounced in cases pending on appeal, yet we find no suggestion that the statutory void could be bridged by a remand under Section 701 R. S.

POINT III.

The question whether the issue of the quantum of plaintiff's damages is a separable issue is not material here, inasmuch as the Circuit Court of Appeals did not reverse the judgment and grant a new trial for errors committed below, said judgment having been vacated by the District Court itself when it had no jurisdiction over the cause.

Defendant contends that the Circuit Court of Appeals had power to authorize a new trial on the issue of the quantum of plaintiff's damages which, it is contended, presents a separable issue within the purview of this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494. Whether or not this is so

is not material here, inasmuch as the question of the power of the Circuit Court of Appeals, upon reversal of judgment for errors committed below, to restrict the new trial to a separable issue is in no wise involved herein. The Circuit Court of Appeals did not grant a new trial; it did not disturb the District Court's judgment. It had found no error and affirmed the judgment in a *per curiam* opinion and by its order of affirmance entered January 15, 1930. Furthermore, as shown by the court's opinion (R., 75) it has adhered to its views on the law of the case by denying, simultaneously with its decision herein, the petition for rehearing which had been filed by defendant and which had remained undecided when its order of remand was made. The case of *Gasoline Products Co.* v. *Champlin Refining Co.* is not apposite here, inasmuch as the question of the scope of a retrial is pertinent only where, in the exercise of its appellate jurisdiction, a new trial has been ordered by the appellate court for errors appearing in the record.

CONCLUSION.

It is respectfully submitted that the orders of the Circuit Court of Appeals of July 6, 1931 should be in all respects affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 314.—October Term, 1931.

Realty Acceptance Corporation, Petitioner, *vs.* Henry G. Montgomery.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 15, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner complains of two orders entered by the Circuit Court of Appeals, one which reversed an order of the District Court setting aside a judgment entered at an earlier term and granting a motion for new trial for the purpose of considering certain newly discovered evidence as to damages, and the other, which vacated its own order previously entered dismissing an appeal from the same judgment and remanding the cause so that the District Court might, in the exercise of its discretion, grant such new trial.

At the March term, 1929, respondent recovered judgment against petitioner for the breach of a contract of employment. An appeal was perfected to the Circuit Court of Appeals, was heard in that court subsequent to the expiration of the term of the District Court, and resulted in an affirmance. Petitioner filed a motion for rehearing, and before disposition thereof presented a petition setting forth that at trial the respondent had failed to disclose certain earnings of which he had been in receipt which should have been taken into account in mitigation of damages; that these facts had been discovered after appeal from the judgment; that the mandate of the Court of Appeals should be stayed to afford the District Court opportunity, if it thought proper, to request the return of the record so that the judgment could be opened and, if justice should so require, a new trial be granted on the issue of the *quantum* of damages. This petition was granted, respondent applied to the District Court, and that court requested the Court of Appeals to return the record for the purpose mentioned. There-

upon the latter court made an order vacating its affirmance of the judgment and dismissing the appeal, thus returning the record to the District Court, which then entertained a motion for a new trial, found the evidence newly discovered within the applicable rule of law, set aside the judgment, and granted a new trial. Respondent then appealed to the Circuit Court of Appeals, assigning this action as error. The latter court held that except for its own orders the District Court would have been without authority to set aside the judgment after the term had expired; that no additional power had been conferred upon the trial court by the previously recited orders in the appellate proceedings; and that there had been error in dismissing the first appeal. Accordingly it reversed the District Court's order granting a new trial, revoked its own order dismissing the first appeal, overruled the petition for a rehearing therein, and reinstated the order affirming the original judgment of the District Court.

The petitioner concedes the District Court lacked power to set aside its judgment after the expiration of the term for the purpose of hearing newly discovered evidence (*United States* v. *Mayer*, 235 U. S. 55, 67; *Delaware, L. & W. R. R.* v. *Rellstab*, 276 U. S. 1); it admits the Circuit Court of Appeals has no original jurisdiction, and possesses only such appellate jurisdiction as is conferred by statute. *United States* v. *Jahn*, 155 U. S. 109, 112; *Whitney* v. *Dick*, 202 U. S. 132; *United States* v. *Mayer, supra.*

But the claim is that § 701 of the Revised Statutes, which defines our appellate jurisdiction, and is made applicable to the Circuit Courts of Appeal by the Act of March 3, 1891, c. 517, § 11, 26 Stat. 829 (see *Ballew* v. *United States*, 160 U. S. 187), authorizes those courts, in the proceeding in error, to set aside a judgment and receive additional evidence, if justice so requires, and that such power may also be exercised by remanding the cause to the trial court for similar proceedings. The section is copied in the margin.*

*The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.

Stress is placed upon the point that in addition to mere power to affirm, reverse or modify, jurisdiction is given in the alternative to order such judgment to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require. From this the conclusion is that though no error appears in the record justifying a modification or reversal the appellate court may, if justice so demands, take further proof which the trial court would be powerless to receive because its term has ended, and on the basis of such proof reverse or modify the judgment. In addition the contention is that though there be no error upon the face of the record the section authorizes its return to the lower court for the opening of the judgment and reception of newly discovered evidence.

The section has been construed as applying to cases where a judgment or decree is affirmed upon appeal and further proceedings in the court below are appropriate in aid of the relief granted. And the statute warrants the giving of directions by an appellate court for further proceedings below in conformity with a modification or a reversal of a judgment where, in consequence of such action, such proceedings should be had. *Insurance Co.* v. *Piaggio,* 16 Wall. 378; *Little Miami &c. R. R. Co.* v. *United States,* 108 U. S. 277, 280; *Fort Scott* v. *Hickman,* 112 U. S. 150, 165; *Pullman Car Co.* v. *Metropolitan Ry.,* 157 U. S. 94, 112; *United States* v. *Eaton,* 169 U. S. 331, 352; *Camp* v. *Gress,* 250 U. S. 308, 318; *Cole* v. *Ralph,* 252 U. S. 286; *Kendall* v. *Ewert,* 259 U. S. 139. *Ballew* v. *United States, supra,* on which petitioner relies, went no farther than this, for there a judgment was reversed in part. Nothing was there said to indicate that this court would order further proceedings below to attack or set aside a judgment entered on a record which disclosed no error calling for a modification or reversal. No authority is cited in which R. S. 701 has been construed as extending this court's powers in the manner for which petitioner contends. *Roemer* v. *Simon,* 91 U. S. 149, is to the contrary. The holding was that upon an appeal in equity this court could not upon motion set aside the decree of the court below and grant a rehearing, and could not receive new evidence; and, further, that as the court below was without power to grant a rehearing after the term at which the decree was entered the remanding of the cause for such purpose would be useless. The opinion

defendant relies. In none of the later cases of the group do we find any reference to the decision of this Court in *United States* v. *Mayer;* nor do any of said cases refer to *Roemer* v. *Simon,* or to the many other decisions of this Court holding that federal trial courts are without jurisdiction to vacate their own judgments after the expiration of the judgment term.

In view of the importance of the question involved, we call attention to *Levinson* v. *United States,* 32 F. (2d) 449, not cited by defendant, in which the Circuit Court of Appeals for the Sixth Circuit in a criminal case granted defendant's motion to permit the District Court to entertain a motion for a new trial on newly discovered evidence. In its opinion the court did not consider the question of the expiration of the judgment term, and held that the District Court had lost jurisdiction because of defendant's appeal which was promptly taken. If the judgment term had not in fact expired, then the District Court after remand clearly would have jurisdiction. The opinion, however, does not disclose whether or not the judgment term had expired.

In *Vause* v. *United States* (unreported to date), in which this Court recently denied certiorari to review judgments of conviction under the federal mail fraud statutes, the Circuit Court of Appeals for the Second Circuit, on December 21, 1921, by a divided court, denied defendant's petition for leave to apply to the District Court for a new trial on newly discovered evidence. The majority of the court in referring to the various authorities on the question of jurisdiction, including the case at bar as pending on certiorari, held that as the motion was denied on the merits the question of jurisdiction became academic.

In *Silva* v. *United States,* 38 F. (2d) 465, the late Circuit Judge Dietrich, writing for the Circuit Court of Appeals for the Ninth Circuit, although denying on the merits defendant's petition in a criminal cause for a new trial

on newly discovered evidence, clearly indicated his doubt, in view of this court's decision in *United States* v. *Mayer, supra,* of the power to remand for such a purpose. It is clear on principle, we submit, that the pendency of the appeal did not keep alive the jurisdiction of the District Court after the expiration of the judgment term, and the only action that could properly be taken by the District Court or that could be directed to be taken by the Court of Appeals would be to carry out the decision of the Circuit Court of Appeals affirming, reversing or modifying, in the exercise of its exclusively appellate jurisdiction, the judgment appealed from. There is, we have seen, no statutory jurisdiction in the District Court to vacate its own judgment after the expiration of the judgment term, nor is there any statutory sanction for a remand by a Circuit Court of Appeals of a cause pending before it on appeal to permit a District Court to exercise a jurisdiction which it did not otherwise possess.

There is no basis for defendant's contention that Section 701 of the Revised Statutes (Title 28, Section 876 U. S. C. A.) affords statutory sanction for the order of remand, which the Circuit Court of Appeals has itself since vacated by its order of July 6, 1931. The provision that the appellate court "may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require," is, manifestly, a power which is incident to and dependent upon the exercise of the appellate power to "affirm, reverse or modify" judgments as therein provided.

This is clear from the decision of this court in *Ballew* v. *United States,* 160 U. S. 187, upon which petitioner relies (Brief, pp. 12-13). There a judgment of conviction based upon a general verdict of guilty after trial of an indictment containing two counts was *reversed* by this court because of certain errors committed by the lower

adds that if the term had not expired the appellate court might, a proper case, upon request of the court below, return the reco for the opening of the decree and for rehearing.

In the present case there is a further conclusive reason why t remission of the cause to the District Court was ineffective give authority to hear the motion to set aside the judgment. Up the original appeal the Circuit Court of Appeals found no error the record and affirmed the judgment, but subsequently rescind the order of affirmance and dismissed the appeal. This action w final, ended the case in that court, and deprived it of all power add to or alter the record as certified. Since there was no c pending power was wanting to make any order granting leave the court below for any purpose. The attempt by remanding t record with leave to the court below to take action which woul otherwise have been beyond its powers left the matter precisely if no such order had been made.

It follows that the Circuit Court correctly held that what w done subsequent to the affirmance of the judgment in the fi appeal was improvident and unauthorized and should be r scinded, and the order which accomplished this end and reinstat the original judgment is

Affirmed.

Mr. Justice STONE took no part in the consideration or decisio of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.